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| **Interim Order Decision** |
| **Site visit 20 September 2021****by Grahame Kean B.A. (Hons) Solicitor HCA** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs****Decision date: 21 October 2022** |
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**Order Ref: ROW/3241907**

* The Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (‘the 1981 Act’) and is known as the County of Lincoln – Parts of Lindsey (Isle of Axholme) Definitive Map and Statement – Definitive Map Modification (Public Footpath 6, Amcotts) Order 2018(1).
* The Order is dated 22 February 2018 and proposes to modify the Definitive Map and Statement for the area by adding to the definitive statement particulars of Public Footpath 6 (FP6) as shown in the Order plan and described in the Order Schedule.
* There was one objection outstanding when North Lincolnshire Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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**Summary of Decision**

1. The Order is subject to modifications proposed that would not show a way shown in the Order as submitted, I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of my proposal to modify the Order in the terms set out below in the formal decision.

**Background**

1. FP6 runs from Church Street in the village of Amcotts, by the mid-19C Anglican parish church dedicated to St Mark, to Trentside close by the river. The present church of St Mark was built in 1853 replacing an earlier church or chapel dedicated to St Thomas A Becket which fell in about 1849.
2. The Order is promoted by the Council, the Order Making Authority (‘OMA’). If confirmed it would add to the definitive statement a description of a small section of FP6, A-B.
3. The Council wishes to establish the correct line of section A – B only, as it is disputed by the owners of neighbouring properties, known as Salisbury House and White House. Each owner alleged that the correct line went over the other’s driveway. There has been very little evidence of user and a padlock has been placed on the gate at B. The Council is uncertain on which property FP6 runs but states that it must be on the driveway owned by one or the other.

**Main issue and legal framework**

1. The main issue is whether the available evidence shows that, on the balance of probabilities, the Definitive Map and Statement (DMS) requires modification.
2. Section 53(2) of the 1981 Act requires surveying authorities to modify its DMS on the occurrence of events set out in s53(3). In particular, the relevant part of s53(3)(c) (iii) lists such an event as the discovery (including the re-appraisal) of evidence which, when considered with all other relevant evidence available, shows that any other particulars contained in the DMS require modification. Modifications that may be made include an addition to the statement of particulars as to the position and width of any public path shown on the map.
3. Interested parties were consulted as to whether a right of way could be recorded as such if, as it appeared, its only basis was that it was used by local people going to and from the church. Only the Council replied and I note its statement clearly implies legal action would be taken if the decision did not reflect what it considered was a straightforward matter of amending the statement to describe the length between Trentside and White House Farm to reflect key evidence in highways committee minutes from 1 October 1956 (1956 minutes).
4. Nevertheless I must apply the facts and law to the best of my ability in reaching a conclusion on the order before me, whether that is in the Council’s favour or not. The Council has also stated that the discovered evidence is said to be principally in relation to the Finance Act 1910 that offers new insight into the situation that was investigated in the 1950s and early 1960s. In any event I have considered all the evidence supplied.

*Definitive map and statement: general principles*

1. The definitive statement for the area contains no description of FP6 at all and the definitive map is at the minimum required scale of 1:25,000. The original document is difficult to use confidently to ascertain the precise route. An enlarged image of the definitive map appears to show the definitive line of FP6 south of the boundary through the White House premises but given the scale and absence of particulars it cannot be assumed that is deliberate.
2. The purpose of the definitive statement is to provide greater detail as to the particulars of its position or width. Generally the 1981 Act recognises the importance of maintaining, as an up-to-date document, an authoritative map and statement of the highest attainable accuracy (see *R v SSE, ex p Burrows and Simms [1991] QB 394 (Court of Appeal (Civil Division)*. The duty has also been expressed as one to produce the most reliable map and statement that could be achieved, by taking account of “*changes in the original status of highways or even their existence resulting from recent research or discovery of evidence*” (*R v SSE ex parte Simms & Burrows [1991] 2 QB 354*).
3. It has also been held in *Perkins v Secretary of State for Environment, Food and Rural Affairs v Hertfordshire County Council [2009] EWHC 658 (Admin),* that “*there is no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence*” (emphasis supplied). This must be so, despite the purpose of a DMS which as *Trail Riders Fellowship v Secretary of State for the Environment, Food and Rural Affairs [2017] EWHC 1866 (Admin)* held, is to delineate precisely the ways in question.
4. In this case there is no proposal to vary the route as shown on the definitive map. The presumption, derived from the wording of s56(1)(a) of the 1981 Act, is that where the map shows a footpath, it shall be conclusive evidence that there was at the relevant date a highway as shown. A definitive map is only conclusive as to the existence and status of a right of way until a review under s53 of the 1981 Act has been carried out (see *Fowler v Secretary of State for the Environment, Court of Appeal (Civil Division)(1992) 64 P. & C.R. 16*).

*Discovery of evidence and standard of proof*

1. The basis for changing the statement is found in the wording of s53(3)(c)(iii) and no point has been taken that this sub-paragraph is not apt to enable particulars to be added to the statement where there were none before. However, for new particulars to be added, discovery of evidence since the relevant date of the DMS is still needed so as to show, on the balance of probability, that the statement requires modification. The meaning of discover is, as was held in *Mayhew v Secretary of State for the Environment [1993] 65 P. & C.R. 344*, to find out or become aware. Discovered evidence should be considered together with all other relevant evidence when weighed against the presumption that the definitive map is correct.
2. There is also a general principle that is potentially relevant, the presumption of regularity, summed up in the Latin tag *omnia praesumuntur rite esse acta*: all things are presumed duly to have been performed. Applied to the compilation of the DMS it presumes the validity of an act done by a public authority due to the existence of a state of facts which cannot, with the passage of time, be proved. It presumes that the authority acted lawfully in accordance with its duty. This will become relevant to consider as discussed below.
3. Section 53(3)(c) is intended in appropriate circumstances to permit the downgrading of a right of way or its complete deletion from the definitive map if evidence justifying this course has come to light. As appears from my assessment below, on the balance of probabilities and the available evidence the inclusion of the line of FP6 in the DMS was incorrect. The entry on the definitive map is not conclusive evidence for ever. One may consider whether there was at the time when the definitive map was prepared, a public right of way. If the evidence now shows that there was at the time of the review no public right of way over the relevant land, and if there has been no stopping up or diversion under statutory powers, then it can only be that there never was a public right of way.
4. Two matters potentially restrict me from pursuing that issue to its logical conclusion: firstly, as was held in *R. v Secretary of State for the Environment, ex p. Kent County Council (1994) 93 L.G.R. 322* where the issue was the precise route of the footpath, not its existence or its length, and where part of a footpath had been mistakenly delineated on the DMS, there was no power under s.53 of the 1981 Act to delete the footpath in its entirety. That said, and as was held in *Eyre v New Forest Highway Board [1892] 56 JP 517*, evidence relating to the whole of a route should be considered even when, as here, only a part is in dispute. Secondly, the evidence needed to outweigh the initial presumption that the right of way exists must, as was held in *Trevelyan v SSETR [2002] EWCA Civ* 266, be “*evidence of some substance*”. Although these words were emphasised by the Council the court itself affirmed (paragraph 38) that at the end of the day the standard of proof is the balance of probabilities.
5. I note also that the issue of adding to particulars and deleting a right of way are both subsumed within s53(3)(c)(iii) which was commented upon by Glidewell LJ in *Burrows*, as really dealing with two separate matters, but at any rate the standard of proof is similar. Moreover, the first limb is apt to cover “*the deletion of a right of way which the latest information proves should not have appeared on the map at all*”. In this connection I see no reason why an entry made on the basis of information wrongly understood to provide a foundation for the existence of a public right of way, should not be treated on the same footing as a mistake due to lack of historical knowledge. If so, the entry is susceptible to correction, provided the evidence for the mistake (ie the law as it then stood) has a substance and cogency to it sufficient to displace the presumption that the DMS is correct.

**Documentary evidence**

1. The evidence which the Council submitted is limited, consisting mainly of an enlarged version of the DMS, three historical OS maps, extracts from the Finance Act 2010 records, brief statements made in the parish survey at the time the draft definitive map was published on 21 September 1953 (the “relevant date”), and minutes of (but not the report to) a county council highways committee meeting of 1 October 1956. The Council was subsequently invited to supply any other evidence of the whole path’s existence (other than the DMS) that might demonstrate public user, however none was forthcoming.

*Historical OS mapping*

1. All three maps contain a FP (public footpath) annotation on a separate route close by, but not included in the DMS.
2. Ordnance Survey (OS) maps do not show the legal status of a way but are evidence of the existence of a way where shown. The 1887 1:2,500 map shows a footpath from the churchyard consistent with the route of FP6, and through the land on which the Salisbury House plot was to be established, until it meets the boundary with White House, then clearly existing. Across the path there is a solid line which forms part of the northern boundary of the White House, inside which a wide carriageway appears to lead eastward to Trentside which would have been the main entrance to the farm complex.
3. The County Series 2nd edition OS map 1:2,500 of 1906/7 shows a path, also with double pecked lines, continuing down past Salisbury House, but then it appears to turn east to Trentside within the field to the north, ie outside the driveway of the White House and along what is now the driveway to Salisbury House. The c1945 OS map shows a similar alignment of the footpath but at 1:10,000 it shows less detail.
4. The Council states that the 1887 map “*would trump the later one*” as the path connects to the White House driveway. However, I disagree. Above the well-defined and established White House farm complex, the fields were open and the Salisbury House plot had not yet been formed. None of the maps is conclusive and the 1887 map is open to interpretation as to whether in fact the path stopped at the boundary with White House where there is a solid line.

*The section of FP6 between the kissing gate and Church Street*

1. The development of the graveyard at the church is an interesting feature of the topography of the area. According to the 1887 OS map it seems to have been formerly contained within a smaller area of land and the pathway between the kissing gate and Church Street. The path is shown but alongside the cemetery to the west, and clearly outside it. The land to the west on the other side of the path was, at this point in time, open land and part of the field system to the south whereas on the c1906 and 1945 OS maps it is shown enclosed and part of the graveyard. On the latter maps therefore the path remains in the same position but now traverses what would be consecrated ground on both sides.
2. Given that the main entrance for parishioners is and would have been likely to have been at the south porch, there is no need to walk up to the main gate where access is gained to Church Street. Where a public footpath or other highway existed over land before that land was consecrated as a churchyard, it will have continued in existence in spite of the fact that the land had become a churchyard. So a public right of way may pre-date consecration of the land and if so the act of consecration cannot extinguish it. However no information has been submitted to demonstrate (other than its inclusion in the DMS and contrary to the parish survey) a public right of way through or along the churchyard north of the kissing gate.

*The definitive map and preparatory materials*

1. Publication of the definitive map in 1962 was preceded by issue of a draft map for comments or objections, and then a provisional map which owners, lessees or occupiers could object to at the quarter sessions. The statement part of the current DMS does not describe FP6. However when the draft map was said to have been published on 21 September 1953 (no copy is available), the parish survey form of public rights of way, signed by Mr Thornton, the Chairman of the parish meeting on 30 June 1953, contains handwritten entries describing the start and end points of the route respectively as:

“*at the kissing gate at Churchyard”* and *“at Mr Waterlands Farm & White House Farm.*” (The Council states that it reads “the Waterlands Farm but I disagree).

1. As I observed on my visit, the kissing gate is at the corner of the original graveyard where it abuts the field to the south. However the definitive map clearly shows FP6 continuing north from the kissing gate through the churchyard to the main entrance and gate at the roadside. I note in passing that it is well established that it is not a requisite of a public right of way that it must lead from one highway to another and a cul-de-sac may be a public highway if there is a feature that might cause the public to wish to use the way, therefore there is no reason why the entrance to a churchyard should not be an appropriate terminus.
2. Turning to the survey form it described the way thus:

*“Footpath runs around edge of field following line of churchyard hedge etc, instead of across field as marked on map.”*

1. As noted, a path is depicted around the edge of the fields on the OS maps, more or less commensurate with the line of FP6, at least down to Salisbury House, passing clearly outside and to the west of the other Trentside properties. However on each OS map there is another path (which I will call the diagonal path) marked “FP” (not the case with the line corresponding to FP6) and in the 1906/7 and 1945 maps it proceeds diagonally across the fields from the churchyard and then south, passing to the west of the boundaries of all the properties on Trentside, including Salisbury House and White House until it reaches Trent Side Farm. From there it appears to go east through that property until it emerges at Trentside.
2. There is another short path on the maps linking the FP6 route with the diagonal route, and in the 1887 map “FP” is marked above it, but in my view the annotation refers also to the continuation of the route south after it joins the “diagonal” route. The southern section of this diagonal route proceeds further south past and outside the boundaries of Trent Side Farm and Trentholm, before turning east outside the southern edge of Trentholm and into the property below, where it appears to end.
3. From Appendix 15 of the Council’s statement of grounds “FP” was marked on OS maps from 1883 so that “*the public may not mistake them for roads traversable by horses or wheeled traffic*.” Its notation on the diagonal route at the side of the Trentside properties is not in itself indicative of a public right of way but it is also inconclusive whether a wider or better-defined way at the time of OS survey then existed in the form of the path which aligns with FP6.
4. The overall pattern of the pathways seems to be a series of accesses physically present at the time of the OS surveys from the rear of various properties on Trentside, going across or around the fields up to the churchyard. However they do not provide a distinct and clear through route to Trentside.
5. The survey form succinctly states as the “*grounds*” for believing the path to be public:

“*Older residents state pathway was in use for church attendees from farms*.”

1. I deal with the possible consequences of this statement as grounds for making the way in question a public right of passage, below.
2. The 1956 minutes were from a former county council which existed until 1974. They noted a report of representations and objections to the draft map and statement for the Isle of Axholme Rural District. At this point the DMS had not been published. The existing route of FP6 was thought of as “*from the main village street eastward, southward and eastward to extreme southern point of Trentside Road*”, but the committee considered the corrected route of FP6 in the statement should be:

*“From main village street eastward and southward to accommodation road leading to the White House and thence eastward along accommodation road to Trentside Road.”*

1. However when the DMS was published there was no statement of the route of FP6 whatsoever. There is a considerable time lapse between the later publication of the DMS, and consideration of the representations (of which no detail is given), and no reasons given to support the corrected description of the route. Furthermore, there is no accompanying user evidence in relation to the 1956 minutes to support the proposed correction. It is not unreasonable to assume that no such statement was taken forward into the DMS because the “corrected” route was not in fact regarded as correct.
2. “*From main village street eastward*” does not tally with the start of FP6 at the kissing gate in the churchyard. If one were starting from the main village street eastward, one would not walk through the lychgate or main entrance, down through the churchyard to the kissing gate and beyond, which however is now the definitive route. And at the other end, whilst there may have been an accommodation or access road down to the White House, the description does not admit of any specific access road “*thence*”; it could have been through that property or eastward along the northern boundary within Salisbury House (insofar as one can ascertain what was then the extent of the Salisbury House plot: the 1945 map shows the land still relatively unenclosed). Indeed a separate field provides continuation of a marked path eastward to Trentside which is outside the White House driveway.
3. On its own the 1956 minutes are not in my view possessed of sufficient probative value confidently to conclude therefrom that the DMS should have particulars added to it that define the route through the White House, especially given the lack of clarity in the definitive map.
4. The Council provided a WW1 soldier’s record of a waggoner on a farm in 1911, employed by a John Waterland. The Council suggests that Trentside Farm, off Trentside further to the south could have been Waterlands Farm and that the 1956 minutes provide some support for that proposition, but there is no robust evidence to support a conclusion to that effect.

*Finance Act 1910 records*

1. The field books prepared about 1910-1920 for tax purposes under the Finance Act 1910 are inconclusive as to the status or course of FP6. They show that Salisbury House and White House then existed, the former comprising “house, buildings and land”, the freehold owned by Mrs Emily Smith. The name of the previous occupier is crossed out and one can see that “J Waterland" is recorded as the current occupier. “White House Farm” was a “house, buildings and farm” owned and occupied by J. Waterland so the latter may then have been in possession of both places.
2. However the reference to “*Waterlands Farm & White House Farm*” as the end point of the route in the “corrected” route is inconclusive. The Finance Act records do not prove the exact route through one or the other. Neither property has any deduction made in the space provided for a “*Public Right of Way or User*” and there are no plans or maps to go with the records. Their overall significance is neutral, public and private roads were often omitted from the plot valuations, and certainly no deduction was made for a public footpath.
3. Incidentally, the Council does not refer to the entries in the field books that make reference to Mr Waterland as occupying White House and Salisbury House. Its suggestion (paragraph 2.4 of its statement) that there is a link between Waterlands Farm as noted in the survey and Trentside Farm is in my view somewhat convoluted and ignores the clear link between Mr Waterland and White House and Salisbury House described in the Finance Act records.

**Other matters and further consideration**

1. To have regard only to the presumption as to conclusiveness of the definitive map and use it to justify adding to the particulars in the statement, would run counter to the object of a review under s53. This is why particular attention should be given to the claimed new evidence discovered since the date of the DMS that makes it evidence of some substance to induce modification.
2. White House Farm was established and prominent in the locality well before Salisbury House, with its own well defined and wide access road to Trentside. But it does not follow that the way described in the 1956 minutes, or for that matter any public way, existed through the former property as opposed to along a pathway immediately to its north, as one reached the end of the accommodation road “*leading to*” the White House. Indeed “accommodation” road is more likely in my view to refer to the space set out north of the already established driveway that belongs to White House.
3. Dictionary definitions of accommodation road include roads serving residential properties or land not considered as highway, eg Ballentine’s Law Dictionary 3rd edition defining it as a road for access to private property. It has also been held in *Wood v Veal 5 Barn & Ald. 454* when considering a way that was not a thoroughfare, that “*if a road be for the accommodation of particular persons only, it is not a public road*”.
4. Some cases tend to contrast public rights of way with a “mere” accommodation road or such a road “only” for access, or which accommodates access to certain properties. A way set out as an accommodation road of which the public enjoy use may, after a lapse of time, imply dedication. However there is no evidence of any express dedication of the route of FP6 or evidence of its public use as such that accompanied the material surrounding the “corrected” route referred to in the 1956 minutes.
5. In the original survey no mention of an accommodation or access road is evident. Quite what is the accommodation road referred to in the 1956 minutes is only conjecture. The term appears twice suggesting more than one such road is traversed, due to the change in direction. However, why the main driveway to White House should have been intended as an accommodation road when it had already been well established for several years, is as uncertain as the (more plausible in my view) supposition that the accommodation road eastward references that within the relatively recently defined plot at Salisbury House.
6. One does see in the c1907 OS map a demonstrable extension of the double pecked line now turning east to Trentside but within the Salisbury House plot. That is not sufficient an indication from which to infer a public right of passage, or a change in what in my view was stated to be the origin of the way, namely a way to church by farm attendees. This would have been for the purposes of church business by those with an interest in such matters. In *United Land Company v Great Eastern Railway Company (1873-74) L.R. 17 Eq. 158* the court agreed that:

“*when a right of way is granted for one purpose it cannot be used for another…The law is perfectly settled that if one man has a right of way over the land of another to go to a particular place, he cannot use it for the purpose of going to that place and a place beyond it, because the servient tenement is only subject to a certain use and a certain inconvenience. He has agreed that it shall be used for a particular purpose, and having so agreed, he is not bound to submit to its being used for any other purpose”.*

1. A gate in the boundary between Salisbury House and White House was installed at Point B at some unknown time but probably on or after the definitive map was published in its final form, and as shown in the 2017/18 photographs supplied. Point B to all intents and purposes coincides with the end of the route as originally described in the survey form, ie at the Waterlands Farm and White House Farm.
2. The survey form did not contain anything in the part that asked about previous maintenance. I think it likely therefore that the path had not been maintained by a local authority charged with maintaining public rights of way. Nor did Mr Thornton complete the section that asked about any documents taken into account in making the survey. I conclude it was likely that there were none such as would verify particulars or users of the route. Nor is there any entry opposite the question about known limitations. Also the space left for the date when the survey took place is left blank.
3. There is no record of objections specifically to the draft map when published, although the objector states that the owner was then away. It is understood the objector’s family has a long-standing presence in the village and it is possible this is within his knowledge. He states that the footpath “*was created mainly for villagers to make their way to church along with other ones* [ie footpaths] *which have since been closed*”. The Council appears to take from this statement that some users of the route must have used it for purposes other than church attendance. However the statement reinforces the entry in the survey form, in that the single or main purpose behind the user was not in referable to the general exercise of public rights of passage.
4. The presumption of regularity as applied to the DMS would assume the veracity of a statement made in connection with its compilation as to use of the way by the public in general, but there is no such statement. I see no basis for attributing the compilers of the DMS with knowledge of user other than what had been stipulated, namely church attendees. The objector’s statement is not a substitute and even if it were to be interpreted as referring by implication, to users other than church attendees, it is not itself direct user evidence.
5. What also remains significant in my view is the absence of any robust contemporaneous or ex post facto explanation for the revision of the original description of the route, signed off by Mr Thornton to extend it through farm or other properties and out to Trentside.

**Whether it is likely that a mistake of law resulted in adding FP6**

*The user evidence refers only to church attendees*

1. If the use of the footpath was only for parishioners to walk over to church on particular occasions, ie a churchway and that was the only basis on which the draft definitive map was drawn, one is entitled to ask whether such a right could have existed in any event as a matter of law, as a public right of way.
2. The residents apparently recounted that the path “*was in use*” for church attendees from farms. It is ambiguous whether “was” means there was then a current ongoing use, or that there “once was” or “had been” a habitual use of the way for going to or from the church. The information was elicited from older persons, which would be a usual means of informing a conclusion as to long user and although there may not have been in the 1950’s a significant use, older residents may well have been recalling a time when there was and it does not preclude use more recently prior to 1953 by younger residents.
3. A right to a churchway is a customary right of user by the parishioners for church purposes, and the public have no right to use it. Lord Hale in *Austin's case 1 Ventr, 189* observed:

*“If a way lead to a market, and were a way for all travellers, and did communicate with a great road, it is an highway; but if it lead only to a church, to a private house or village, or to fields, there 'tis a private way. But it is matter of fact, and much depends upon common reputation."*

1. Further, in *Thrower's case (1672) 1 Ventris 208; 86 E.R. 140,* the defendant was indicted for barring a common pedestrian way to Whitby Church. It was held that an indictment could not lie for a church path; besides the damage, it was said, is private, and concerned only the parishioners. Lord Hale added:

“*for ought appears this is a common foot-way, and the church is only the terminus ad quem, and it may lead further; the church being expressed only to ascertain it, and 'tis said ad commune nocumentum; wherefore the rule was, that he should plead to it*”

1. To translate, the court was saying that it appeared that the church in question might only be a point along the way and the harm done by preventing rightful passage was to the community at large; therefore the indictment (ie to assert a public right) was good.
2. In the present case there may have been further destination points for travellers beyond the way to church, but the destination given in the survey is consistent with arrival at St Marks churchyard. C*hurch attendees* may not refer exclusively to the Anglican parish church and older residents might have been recalling chapel attendance in the early part of the 20thC, since there was a Methodist chapel in use until it closed and was demolished in the 1930’s. However, taken with the description of the route then given, I find this unlikely.
3. Until relatively recent times[[1]](#footnote-1) a statutory duty was placed on members of the Church of England to attend church, since the time of Edward VI (5 & 6 Edw. VI cap. 1). By law the parish church was open to every parishioner who desired to enter for the purpose of attending the ordinary services, and although most people would have considered that compulsory attendance had ended in 1846[[2]](#footnote-2) it was still the case in 1887[[3]](#footnote-3) that a court was able to state, after reviewing the authorities that “*there is a statutory obligation, and an absolute right to attend the parish church or place accustomed*.”
4. With a general duty to go to church, there is a general right to resort there but of course no particular route is prescribed. There is no evidence of a grant and any prescriptive right that may have arisen at least in the first instance, is unlikely to have been a public right but a private easement or churchway.
5. As noted previously there are other routes up to the churchyard. FP6 would have provided a direct route for farm workers coming from the fields and farms to the south of the village, but also for those toiling in the fields further to the west, the road that runs up to Hook House at the junction to Church Street could be used. The line of FP6 does not inherently suggest a more logical route for public passage than others marked on the OS maps.

*There has been no evidence of sufficient use other than by church attendees*

1. Sufficiency of user should also be considered. In *Hollins v Verney [1884] 13 QB 304* it was said that:

*“No user can be sufficient which does not raise a reasonable inference of such continuous enjoyment. Moreover.. no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognized, and if resistance to it is intended*.”

1. Under common law dedication, a public right of way depends on use by the public as of right, continuously and without interruption. The number of users must be such as might reasonably have been expected if the way had been unquestionably a highway. *Mann v Brodie [1885] HL 378, 10 App Cas 378*.
2. Putting the exercise of the putative right at its highest, each farm attendee from the farms around the south and south-east part of the village might have made use of the way to attend church or the churchyard, including Sunday observance, religious festivals and rites. In all however, “church attendees” from the farms in that specific quarter of the village would have formed a specific and limited class of persons, and so limited in frequency if not regularity, as to put into my mind considerable doubt as to whether they could be the subject of a grant to, or dedication of and acceptance by, the public at large.
3. With the demise of the open field system and onset of enclosure, landowners no doubt were more interested in asserting and protecting the incidents of their ownership. However I doubt that the progress of churchgoers across one another’s fields would not have been acceded to other than on a fairly informal and therefore unregulated basis. Judging objectively from how such use would have appeared to landowners, it would have been tolerated only for the purposes and at the times at which it would have been exercised, ie when church attendance was expected or desired.
4. Given the lack of any formal grant, what in my view must have started as an informal practice could have evolved through stages of: a customary churchway, usable by a defined class of persons such as farm occupants and/or workers, then a wider class of parochial church members, through to use within the locality such that it becomes a public use. As was held in *Attorney General & Newton Abbot RDC v Dyer [1945] 1 Ch 67*:

*“…where…there is a body of evidence of user of the way strictly as a public way, it is legitimate to add and to rely upon evidence of user in connection with the privilege mentioned…on the ground that the privileged class of licensees or local inhabitants are also members of the public and pass along the way in their latter character.”*

1. The difficulty in the present case is that there is no body of direct evidence of user of the claimed right of way at all, past or present, whether by farm employees, occupants, church membership, or the local inhabitants in general.
2. The lack of user evidence in recent times is unsurprising since the way is obstructed and notices outside the drive leading to White House deny a public right of way. No other actual use is recorded outside the survey completed by the parish council as a preliminary step to compiling the DMS, notwithstanding the 1956 minutes which were without explanation or supporting user information and contrary to the surveyed route which latter was specific as to the nature of the user found to have existed. Furthermore there are ambiguities in the alternative route said to be the “corrected” route.
3. Also, the quality and quantity of use relied on to infer the probability of either conjectured routes from Point B through to Trent side, other than as a normal access enjoyed by landowners and permitted visitors, is slight. I am clearly of the view from the appraisal of all the information so far available, that a more general public right of passage did not exist from A-B.

*The documentary evidence does not disclose cogent evidence of public user*

1. There is no evidence apart from what is reported in the survey form that supports any actual user at all. Such inferences that might be made from the marked paths in the OS maps do not extend to any reputation that the way in question (as opposed to other paths) carried public rights. The Finance Acts related papers are essentially neutral on the point.
2. The more recent 1956 minutes do not rationally explain the start and end points for the reasons described above. I accord them little weight in the absence of contemporary supporting information. By contrast, the survey form at least gives a rational start and end point for a path that, it is reasonable to assume according to the presumption of regularity, would indeed have been used by church attendees, no other users being mentioned.

*Conclusion*

1. The evidence does not satisfy me that persons using the way for such specific purposes, could have evolved into a sufficiently large section of the local community that could have given rise to public rights of passage. There is no statement within the DMS preparatory material as to general public user, the veracity of which can be assumed in accordance with the presumption of regularity, other than of course the very precise reason given for exercising the putative right of passage, namely that it was for church attendees, which is inconsistent with the broader basis of public user required for the existence of a highway.
2. I am satisfied that the way could not have been other than a private way and it was an error of law to ground the compilation of the DMS in such user, and in that respect proper procedures were not followed. The scant history of the use of the claimed way cannot assist the inference that it must have been public. The lack of other user evidence and the inconsistency in the grounds for inclusion in the DMS, displaces the presumption of regularity that proper procedures were followed. There is no currently available subsequent evidence of user of any quantity or that would meet the tripartite test, and convert the private way into a highway.

**Absent mistake of law, is public user through White House demonstrated?**

1. The Council’s case proceeds on the assumption that “*North Lincolnshire Council were right to seek to modify the definitive statement describing FP6 as running along the driveway to the White House as opposed to the driveway to Salisbury House*”. However I disagree that the description of the “corrected” route demonstrates this basic premise.
2. The 1887 map does not show the double pecked path proceeding beyond the edge of the northern boundary of White House. The way is of a similar character from the churchyard to that point but not beyond. The 1906/7 map also shows the path stopping at the White House boundary where there is a solid line, but a way which, if nothing else, is clearly an access way formed for the occupiers of the recently established Salisbury House onto Trentside. The c1945 map is similar in this respect. I also read the three maps as of a piece in making it unlikely in my view that a through route was clearly established at those times through White House to Trentside.
3. From the descriptions of the route in the parish and other local authority documents, taken with the historical mapping evidence, and confining my consideration to the section of FP6 at issue, the more likely way that was established was from the entrance to the churchyard at the kissing gate, down to White House. I am satisfied on the balance of probability that taken as whole the information available does not demonstrate a public through route to White House and thence through section A -B of the Order route.
4. If an alternative route through Salisbury House is the correct line of a public right of way, there needs to be some evidence of substance of that very point, namely that it was a public right. As noted above, evidence relating to the whole of a route may be relevant to consider in relation to the part in dispute. The material submitted suggests if anything that it would be more likely that the route proceeded through what is now the Salisbury House driveway.

*Other matter*

1. It will of course be noted that to formally end the footpath at the boundary of Bank House/Salisbury House would create a highway that is isolated in that the public do not have a right freely and at their will to pass and repass that point to a thoroughfare. It is hardly a point of interest in itself. Be that as it may, it will be for the OMA to decide what action and/or representations to make before confirmation or otherwise of this interim order.
2. The parish council’s opinion was that to end the footpath at this point a stopping up order would need to be made. That remains an option as it does for the rest of the way, it is not a matter for me.

**Overall conclusion**

1. To answer the point, that the exact route of the existing footpath requires to be known, by finding that there was no such public way, may be satisfactory to some and not so to others. However, my decision is based on the facts of the case as they have been made available to me, and not on whether or not the outcome is desirable or otherwise. The burden of proof is the balance of probabilities and the language of this decision is not intended to raise the threshold of proof above this ordinary civil test.
2. I disagree with the Council’s assertion that the 1956 minutes are clear in stating at the draft map stage that A-B ran down White House Farm driveway, the OS maps suggest another route north of that driveway, there is no explanation of the “corrected” route, and it was not carried forward accurately into the DMS. On review, it is not a simple matter of applying the Trevelyan presumption to confirm, by addition to the DMS particulars, what the map appears to show. I am satisfied on the balance of probabilities and on the evidence so far available to me, that there was a mistake of law that resulted in adding FP6 to the DMS, and therefore section A-B, and consequently that there is no public right of way over section A-B as shown in the map and statement as a highway of any description.
3. Since the Order as proposed to be modified would not show part of a way shown in the order as submitted, I am required by virtue of paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposals to modify the Order and to give an opportunity for objections and representations to be made to the proposed modification. A letter will be sent to interested persons about the advertisement procedure.
4. I should also record that absent my findings above it would appear slightly more reasonable to allege that any public right of way would have passed through the driveway that currently belongs to Salisbury House and not White House. Given my findings, that is not the subject of the proposed modifications. Nevertheless, I appreciate that matters have been raised in this interim decision that have not been fully considered by the parties. The advertisement of the proposed modifications will allow interested persons the opportunity to make further representations.
5. Simply not confirming the Order would not provide a way forward. As was held in *Trevelyan* where the circumstances persuade the inspector that the definitive map should depart from the proposed order, they should modify it accordingly.

**Formal Decision**

1. In consequence of my findings the Order is modified as follows:
2. In the first paragraph of the Order delete all wording after “shows that” and replace with “there is no public right of way over land shown in the map and statement as a highway of any description – of the Act.”
3. In Part I of the Schedule to the Order, under Modification of Definitive Map, delete the wording and replace with “Points A - B as indicated on the Map to be deleted.”
4. In part 2 of the Schedule to the Order, under Modification of Definitive Statement, delete all wording.
5. On the plan attached to the Order, delete that section shown between points A and B.
6. As a result of the proposal to delete section A-B from the definitive map and statement, the modifications need to be advertised by virtue of paragraph 8(2) of Schedule 15 to the 1981 Act. Given the need to advertise the proposed modifications an opportunity is given for representations/objections to be made.

Grahame Kean

INSPECTOR

**COPY MAP – NOT TO ORIGINAL SCALE**



1. It is often supposed that mandatory churchgoing was abolished by statute in 1846, but it continued in theory until the Statute Law (Repeals) Act 1969 came into force with effect from 1 January 1970. [↑](#footnote-ref-1)
2. 9 & 10 Vict. cap. 59 [↑](#footnote-ref-2)
3. see *Asher v Calcraft (1887) 18 Q.B.D. 607* [↑](#footnote-ref-3)