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## Order Decision

Inquiry held on 25 July 2018

**by Barney Grimshaw BA DPA MRTPI(Rtd)**

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

**Decision date: 20 September 2018**

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### **Order Ref: ROW/3174677**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Lincolnshire County Council, Amendment of Lindsey County Council (Rural District of Horncastle) Definitive Map and Statement (Addition of Coningsby Public Footpath Number 1124) Definitive Map Modification Order 2016.
- The Order is dated 8 February 2016 and proposes to modify the Definitive Map and Statement for the area by adding a footpath running between the junction of School Lane/Laythorpe Gardens and Dogdyke Road, Coningsby, as shown on the Order Map and described in the Order Schedule.
- There were over 30 objections outstanding at the commencement of the inquiry.

**Summary of Decision: I propose to confirm the Order subject to modifications that require advertising.**

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### **Procedural Matters**

1. I held a public inquiry into this Order on Wednesday 25 July 2018 at Coronation Hall, Woodhall Spa. I made an unaccompanied site inspection on Tuesday 24 July when I was able to walk most of the Order route. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

### **The Main Issues**

3. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
4. Much of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

5. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

## **Reasons**

### ***Documentary Evidence***

#### *Early Maps*

6. Maps prepared before 1889 do not show the Order route although Lincolnshire County Council, the Order Making Authority (OMA) considers that maps produced by both Bryant (1828) and Greenwood (1830) suggest the presence of a short section of route running southwards from School Lane.
7. Ordnance Survey (OS) maps dated 1889, 1906, 1947 and 1953 all show the whole Order route although part of it seems to be on a slightly different alignment. However, although OS maps provide good evidence of the existence of a route at the time they were surveyed, they do not indicate whether there were any public rights over it.

#### *1910 Finance Act*

8. This act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be made for the purpose of reducing liability. The existence of public rights of way over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.
9. The records that are available show the Order route as being included within 8 privately owned hereditaments. In 3 of these (Nos. 110, 203 and 628) a restriction of a footpath was recorded and a deduction from value allowed in respect of "*Public Rights of Way or User*". On the OS base map used for the survey the only footpath shown within these hereditaments is the Order route so it seems most likely that the deductions related to this route.
10. The records for the other 5 hereditaments crossed by the Order route include no reference to a public right of way suggesting that the landowners may not have regarded it as public.
11. These records seem to suggest that at the time of the Finance Act survey some of the owners of land crossed by the Order route thought it was a public footpath but most did not. In such circumstances it is not possible to rely on this evidence to determine the current status of the route.

#### *The Definitive Map*

12. In the Parish Survey carried out in 1952 in connection with the preparation of the first definitive map of rights of way the Order route was not indicated and accordingly was not included in the definitive map.

### *Aerial Photographs*

13. The Order route can be seen on aerial photographs taken in 1972, 1999, 2003, 2005 and 2006. On the 2006 photo it appears to be obstructed by a fence at Point H.

### *Conclusions regarding Documentary Evidence*

14. The documentary evidence that is available indicates that the Order route has existed since before 1889. However, with the exception of the Finance Act records which cannot be relied on for the reasons given above, the documents do not indicate the existence of any public rights over the route. Accordingly, the determination of this Order depends entirely on the evidence of public use of the claimed route that is available and whether this indicates that a public right of way can be presumed to have been dedicated in accordance with the provisions of the 1980 Act (statutory dedication) or inferred at common law.

### **Statutory dedication**

#### *Date when public use was brought into question*

15. It was common ground between all parties that the Order route has been permanently blocked close to Point H since 2005. However, evidence suggests that public use of the route or part of it may have been brought into question some time earlier than this.
16. An application for the Order route to be added to the definitive map was made in November 1997 by Coningsby Parish Council (now a Town Council). It is not known whether any specific event triggered the application but, nevertheless, the fact that the application was made indicates that public use of the route was brought into question at that time.
17. Evidence provided by owners and occupants of properties towards the southern end of the Order route suggests that that public use of that section of the route (Points G-J) was subject to frequent obstruction, interruption and challenge from 1981 or earlier. This may have brought public use of the southern part of the route into question by 1981.

#### *Evidence of Use*

18. Twelve User Evidence Forms (UEFs) were submitted in support of the Order, 9 completed in 1997 and 3 in 2009. One person who had completed a UEF also appeared at the inquiry along with one person who had not but described his use of the route. Accordingly, I have been able to consider evidence of use of the Order route provided by 13 people. These people described use of the route from the 1940s (or earlier in one case) to 2007.
19. One UEF was discounted by the OMA as it did not indicate the period during which the path was used. The evidence of the remaining 12 people indicates that 8 used the route throughout the period from 1977 to 1997 and 4 for part of that period. Claimed use of the route in the 20 year period before 1981 is considerably less with only 3 or 4 people claiming to have used it during much of that period.
20. The frequency of use claimed varied from daily to less than once per month although most users claimed to have used the route weekly or more frequently.

21. All users stated that they had used the full route and had not been obstructed challenged or given permission to use it (before 1997).
22. There are some inconsistencies in the evidence of users regarding the way in which the route is described and shown on plans. These are not in my opinion sufficient to cause me to disregard any of the evidence provided although it does mean that it has been necessary to exercise a certain amount of caution in assessing the evidence.
23. There are currently barriers partially blocking the route close to Point B and a sign placed by Coningsby Town Council stating "*NO CYCLING WALK WAY ONLY*". These have been erected recently and there is no suggestion that they were in place before 1997, however, there is evidence that there was previously a stile at this point which perhaps suggests that use of the route on foot was accepted.
24. On the other hand, it is argued by objectors in respect of the southern section of the claimed route that only people known to the landowners were allowed to use the route without challenge and that others were frequently challenged and informed that it was not a right of way. In particular, it was stated that the late Mr D Harriss, occupier of 30/32 Dogdyke Road from 1981, regularly challenged users not known to his family. Mrs Harriss, his widow, also stated that she had sometimes challenged users of the path and that before 1981 other members of her family who had occupied the property since the 1950s also challenged path users not known to them.
25. It was stated by objectors that most if not all of the people providing evidence of unchallenged use of the route were in fact well known to Mr D Harriss and his family and effectively had permission to use the path. It appears that any such permission was implicit rather than having been explicitly given. However, two users also owned adjoining land and one had been a tenant of some of the land crossed by the path and their use may have been by right rather than 'as of right' as required by the 1980 Act.
26. In around 1981 a large shed/garage was constructed on land within the curtilage of 30/32 Dogdyke Road to the west of the claimed path. Access to this, including vehicular access, crossed the claimed route. Mr D Harriss apparently spent a lot of time working in this building close to the claimed path and was said to have not only frequently challenged path users he did not know but also to have often obstructed the path with a vehicle, a temporary gate and saw horses. It was also said that Mr Harriss erected signs close to the path but these may have related to dog fouling rather than specifically discouraging all access.
27. Information regarding the actions of Mr D Harriss was provided by Mrs Harriss and Mr S Harriss, his son, and was corroborated to some extent by evidence of others such as Mr RP Ansell.
28. In addition to temporary closure of the path by Mr Harriss, objectors stated that it was regularly closed on other occasions as a result of agricultural activity, development or other reasons. These closures do not however appear to have been made specifically to prevent the establishment of a public right of way.

29. In 2005 Mr Harriss permanently blocked the claimed route by erecting a gate close to Point H. Despite the fact that some years previously the parish council had applied for the route to be added to the definitive map, this closure does not appear to have caused much local concern. In fact, on the invitation of Mr and Mrs Harriss several parish councillors walked the path to view the obstruction and subsequently took no further action. This contrasts with events in 2014 when a resident of Providence Place proposed to obstruct the northern part of the claimed path and 43 people submitted (standard) letters objecting to the closure, 17 of whom said they had used the path since before 1997. However, in the light of the lack of similar opposition to the closure of the southern part of the path which had taken place in 2005, it is possible that these people only used the northern part of the path.
30. In addition to affected landowners, over 30 other people objected to the Order, mainly by sending standard letters specifically opposing the recording of the route over the gardens of residential properties 26, 30 and 32 Dogdyke Road. These letters did not contain any substantive evidence which assists in the determination of the Order.

#### *Conclusions regarding Statutory Dedication*

31. There is a relatively limited amount of evidence of public use of the Order route available for periods before 1997, which is understandable given the amount of time that has elapsed.
32. With regard to the northern part of the route (north of Orchard Way) there is no substantive evidence of users being challenged or obstructed before 1997.
33. With regard to the southern part of the route there is plausible evidence of challenges and temporary obstructions from 1981 or earlier.
34. On balance, it is my view that the evidence is sufficient to indicate that the northern part of the Order route between Orchard Way and School Lane/Laythorpe Gardens can be presumed to have been dedicated as a public footpath as a result of unchallenged public use in the period from 1977 to 1997 in accordance with the provisions of the 1980 Act. However, with regard to the southern part of the route between Orchard Way and Dogdyke Road, the evidence indicates that public use was brought into question and at least one landowner indicated a lack of intent to dedicate a right of way as early as 1981 and the available evidence of use before that time is not sufficient to raise a presumption of its dedication as a public right of way.
35. The actions which brought public use into question related specifically to the section of the path between Points G and J but, as there is no link to the route from a public highway between Orchard Way and Point G, the whole of the southern section of the route was in my view brought into question.

#### **Common Law**

36. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
37. In this case, although there is some evidence of public use of the southern part of the Order route over a considerable period there is in my view no evidence

of action on the part of landowners which would indicate an intention to dedicate it as a public right of way. Also, there is some evidence to indicate that they clearly did not intend to dedicate it.

38. With regard to the northern part of the route, the situation is somewhat different and it is arguable that its dedication as a public footpath could be inferred at common law but, in the light of my conclusions regarding statutory dedication, it is not necessary to pursue this matter further.

### **Other Matters**

39. Objectors referred to perceived failings on the part of the county council and town council to properly consult landowners and to consider their evidence. They also stated that the delay of almost 20 years after the application for the path before the Order was made had caused difficulties in assembling evidence. However, these are matters outside my remit. I am satisfied that the Order itself was properly made and advertised and it is therefore necessary for me to consider it on its merits in the light of the evidence presented to me, which I have done.
40. Residents of properties close to the claimed path in Providence Place expressed great concern regarding anti-social and criminal behaviour which had taken place in the area of the path. I understand this concern but, as it relates to matters outside the criteria set out in the legislation relevant to orders of this type, I cannot afford it any weight in reaching my decision. However, I would point out that there are provisions under other legislation (Section 118B, Highways Act 1980) which provide for the stopping up of highways for the purpose of preventing or reducing crime which can be used in certain circumstances.
41. A stile was present on the Order route close to Point B during the period 1977 to 1997 which has been replaced more recently by barriers blocking part of the route to discourage cycle use. However, as the stile was present during the relevant 20 year period under the 1980 Act it is appropriate that this should be recorded as a limitation to public use of the route as is proposed in the Order.

### **Conclusions**

42. Having regard to these and all other matters raised, I conclude that the Order should be confirmed subject to a modification to exclude that part of the Order route to the south of Orchard Way.

### **Formal Decision**

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

In the Schedule to the Order, Part I, delete the whole of the first paragraph after the words "(Point E)" and add the following "*The path then runs in a generally southerly direction for approximately 4 metres to the edge of the highway known as "Orchard Way". The total length of the footpath is approximately 104.5 metres*".

Also, delete the second paragraph after the words "(from Providence Place to the publicly maintainable highway Orchard Way)".

In the Schedule to the Order, Part II, delete the whole of the first paragraph after the words "to TF 2228 5772" and add "*The path then runs in a generally*

*southerly direction for approximately 4 metres to the edge of the highway known as "Orchard Way". The total length of the footpath is approximately 104.5 metres".*

Also, delete the second paragraph after the words "(from Providence Place to the publicly maintainable highway Orchard Way)"

Amend the Order Map accordingly.

44. The proposed modifications would have the effect of not showing as a highway part of a way which is shown in the Order. It is therefore required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act that notice of the proposal to modify the Order be given and an opportunity for objections and representations to be made regarding the proposed modifications.

*Barney Grimshaw*

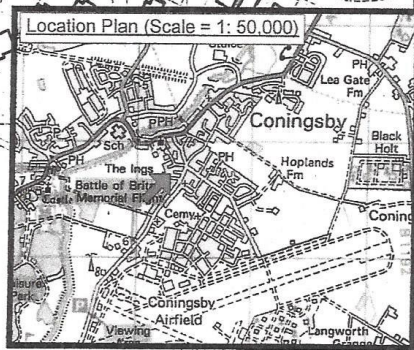
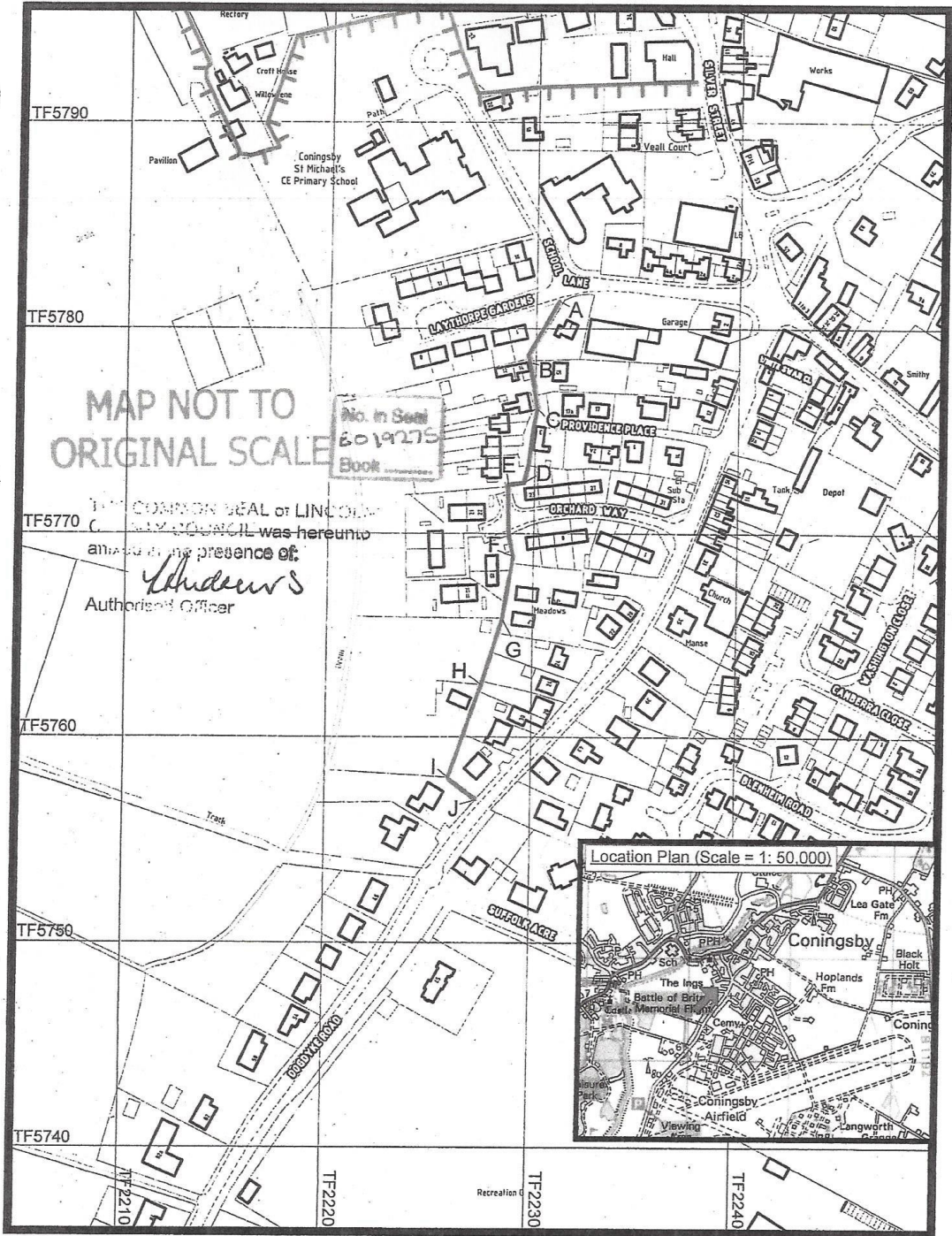
**Inspector**





## **DOCUMENTS**

1. Bundle of documents compiled by LCC.
2. Statement of Case and supporting documents, LCC.
3. Proof of Evidence of Catherine Beeby, LCC.
4. Proof of Evidence of Michael Skipworth.
5. Proof of Evidence of Alma Skipworth.
6. Statement of Case and supporting documents of Mary and Sean Harriss.
7. Proof of Evidence of Mary and Sean Harriss.
8. Statement of Case and supporting documents of RP Ansell.
9. Statement of Darren Anderson.
10. Statement of Tony Barnes.
11. Statement of Chris Allen.
12. Opening Statement, LCC.
13. Closing Statement, LCC.



<b>Key:</b> Footpath to be added (A-B-C-D-E-F-G-H-I-J) Unaffected Public Footpath	Lincolnshire COUNTY COUNCIL Drn. AHB Date 21/11/2015	Coningsby Public Footpath No.1124 from School Lane / Laythorpe Gardens to Dogdyke Road
		Received from Ordnance Survey Public Rights of Way & Countryside Access Scale: 1:25,000