



Order Decision

by **Claire Tregembo BA(Hons) MIPROW**

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

Decision date: 6 September 2022

Order Ref: ROW/3285013

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Lincolnshire County Council Amendment of Lindsey County Council Urban District of Mablethorpe Definitive Map and Statement Evidential Event (No.1) Modification Order 2019.
- The Order is dated 11 September 2019 and proposes to modify the Definitive Map and Statement for the area by adding two footpaths as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Lincolnshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The unconfirmed part of the Order is not confirmed.

Preliminary Matters

1. The Lincolnshire County Council Amendment of Lindsey County Council Urban District of Mablethorpe Definitive Map and Statement Evidential Event (No.1) Modification Order 2019 (the Order) was made for the addition of two public footpaths over land off Marian Avenue, Mablethorpe. The landowner initially objected to both paths, but later withdrew his objection to the footpath between the two ends of Marian Avenue.
2. Lincolnshire County Council (the Council) served notice on The Planning Inspectorate of its intention to sever the Order, as required by Schedule 15 of the Wildlife and Countryside Act 1981 (the 1981 Act). The unopposed Parts I(i) and II(i) were subsequently confirmed on 7 February 2020. The objection to Parts I(ii) and II(ii) of the Order remains, and these parts of the Order are before me to determine.
3. The Council considers that, although there was sufficient evidence to make the Order to record the claimed footpath, there is insufficient evidence to confirm it. Therefore, they do not support the confirmation of the remaining parts of the Order. The applicant for the Order has decided not to promote its confirmation, although they consider they could provide sufficient evidence of its existence.
4. The Order is being determined based on papers submitted. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
5. The footpath before me is shown on the Order map between B-E-F-G-C, for ease I will refer to this as the claimed footpath. I will refer to the footpath between the ends of Marian Avenue, shown on the Order map between A-B-C-D, as the confirmed footpath. When referring to both footpaths I will refer to them as the Order routes. A copy of the Order plan is attached to the decision for ease of reference.

The Main Issues

6. The Order has been made under Section 53(3)(c)(i) of the 1981 Act which requires me to consider if, on the balance of probabilities, the evidence shows that a public right of way subsists along the claimed footpath. This is a higher standard of proof than the reasonably alleged to subsist test to determine if an Order should be made.
7. The evidence submitted in support of the claimed footpath relies on the presumption of dedication arising from tests laid out in Section 31 of the Highways Act 1980 (the 1980 Act). This requires me to consider if the public have used the route as of right and without interruption, for a period of twenty years immediately prior to its status being brought into question. I must establish the date when the public's right to use the claimed footpath was brought into question and determine if use by the public occurred for a twenty year period prior to this, that is sufficient to raise a presumption of dedication. If this is the case, I must then consider if there is sufficient evidence that there was no intention on the part of the landowner to dedicate a public footpath during this period.

Reasons

Documentary evidence

8. Aerial photos showing the Order routes were provided from 1999 to a date between 2006-2019. Google Street View images from 2015 and site photos from 2004 and 2018 were also available.
9. On all the aerial photos, the land over which the Order routes run is an open parcel of grass with some bushes and trees. On the 1999 aerial photo, there are no wear lines visible across the land. There are several wear lines visible on the 2003 aerial photo, but most do not follow the line of the claimed footpath. There is a wear line which corresponds roughly with the south eastern end of the claimed footpath between C and a point halfway between G and F. On the 2005 and 2006 aerial photos, the claimed footpath is visible as a wear line along its full length. Several other wear lines are also visible across the land on the 2005 aerial photo. Three additional aerial photos, with unknown dates after 2006 when Dawson Close was complete, are also provided. The claimed footpath is not visible on these aerial photos, although the quality of two of them is poor.
10. The claimed footpath is not evident on the Google Street View images.
11. A flood risk assessment for the land that is now Dawson Close, dated September 2004, contained several site photos. Only one of the photos showed land crossed by the claimed footpath, which is not visible.
12. The photos from the site visit on 5 December 2018 show some faint wear lines which correspond to parts of the claimed footpath. In some places, no wear lines are visible, but in other locations several wear lines can be seen.
13. These wear lines on the aerial and site photos could indicate a route that was being used by the public at these points in time, although equally they could indicate routes used by the landowner or animals. As several routes are visible on some of the photos, it could also indicate that people were wandering over the land rather

than using a defined route. I consider that these documents provide inconclusive evidence of use by the public of the claimed footpath.

Bringing into question

14. For the public's right to use the claimed footpath to have been brought into question some actions or events must have occurred that bring home to at least some of those using it that their right to do so is being challenged. These must be sufficiently overt to bring that challenge to the attention of the public using the route.
15. A letter from the applicant dated 24 November 2017 states that earlier that day, 2 metre high tubular steel fencing panels were erected at either end of Marian Avenue preventing access. This was supported by witness statements from supporters and the landowner. Although the fencing was not erected across the claimed footpath, it can only be reached from the confirmed footpath, therefore its use was also prevented.
16. The landowner claims he began challenging people when he purchased the land in June 2017, but none of the claimants recall being challenged. In any event this would only bring the challenge date forward by five months. He recalls seeing 'private land, keep out' notices in the past, but none of the claimants remember seeing these.
17. He also claims that large lumps of concrete across the end of Marian Avenue would have prevented access to pedestrians as well as cars and bicycles. These are visible on the 2006 aerial photo, in a row with spaces between them. Although they may have prevented access to cars, they are unlikely to have stopped pedestrians or cyclists.
18. The fencing was an overt act that brought to the attention of the public that their right to use the Order routes was being challenged, therefore I take 24 November 2017 to be the challenge date. I consider the relevant twenty year period for the purposes of section 31 to be 1997 to 2017.

Analysis of use

19. To satisfy the requirements of Section 31, use must be by the public as of right, without force, secrecy, or permission. There is no suggestion that claimed use was not completely open, or that any force was used during the relevant twenty year period. The landowner does refer to the fence being damaged, but this was after it was erected in November 2017. None of the claimants refer to any permission to use the claimed footpath. The landowner does say that he granted one person permission to use one of the paths, but they have not completed a user evidence form (UEF). Therefore, I consider that use of the claimed footpath was as of right.
20. Use by the public should be without interruption. To be effective, any interruption must be by the landowner, or someone acting on their behalf, and should be with the intention of preventing use of the way by the public and not for other purposes such as car parking or building works. I do not consider that the challenges, notices and concrete blocks already discussed in paragraphs 16 and 17 above, interrupted use of the claimed footpath during the relevant period. No other challenges or interruptions are before me. Therefore, I consider that there was no effective interruption to use during the relevant twenty year period.

21. I must also be satisfied that there was sufficient use by the public to raise a presumption of dedication. In support of the claimed footpath, I have UEF from eight individuals, this is less than I would expect for a footpath in a residential area. Five people used the claimed footpath for the full twenty year period, one person used it for nineteen years between 1998 and 2017, one for ten years between 2007 and 2017, and one for a year between 2015 and 2016.
22. Those using the claimed footpath state that they used it as least once a week, with five using it daily. However, all eight of the claimants completed one UEF for both Order routes. This means that it is not clear how frequently each footpath was used, reducing the weight that can be placed on the evidence. Only one person clarified how often they used the claimed footpath. Another indicated that the route they used depended on the time available, the time of year and weather. They stated that the claimed footpath was used less than the one which ran between the ends of Marian Avenue and was more of a dog walking route.
23. All the claimants used the Order routes for dog walking, but they also used them to reach shops, town, the beach, work and to visit friends and family. To me, this suggests that the confirmed footpath was used more frequently than the claimed footpath. People are more likely to take a direct route when going to specific destinations such as local amenities, work and homes.
24. The landowner has owned the land since June 2017, but states that he has had connections with it since 2006 when he purchased the land at Dawson Close, and knowledge of it from when he was attending the adjoining school. He states that he has seen some people using the confirmed footpath, but not frequently and saw people standing on the end of Marian Avenue and letting their dogs off the lead. This indicates that there was infrequent use of the claimed footpath.
25. The landowner states people could not use the claimed footpath as it was overgrown with brambles for years. When he purchased the land, he had to flail it to remove them and find the boundaries. He claims to have witnesses that support this, but statements have not been provided. This could explain why the claimed footpath was not visible on the later aerial photos. None of the claimants refer to the claimed footpath becoming overgrown, so there is nothing to support this.
26. Two of those using the claimed footpath only used the northern and western sections. Instead of using the southern section, they continued south from F, along the western boundary of the land before heading east behind the properties on Dawson Close. One used this route daily for twenty years; they are the only claimant who clarified their frequency of use. The other used it for ten years. This reduces the value of their evidence and could indicate that the public were using different routes over the land.
27. In summary, although there is evidence of use from eight people, only five used the claimed footpath for the full twenty year period, and one of these did not use all of it. The other claimants used it for one, ten and nineteen years, one of whom did not use the full length. Although all the claimants indicate at least weekly use, this is for both Order routes. The UEF suggest infrequent use of the claimed footpath compared to the confirmed footpath, and this is supported by the landowner's comments.

28. Due to the limited level of use and the unclear frequency of use, I am not satisfied, on the balance of probabilities, that there is sufficient evidence of use to raise a presumption of dedication of the claimed footpath.

Lack of Intention to dedicate

29. As I have concluded above that there was insufficient evidence to raise a presumption of dedication, I do not have to consider if there was any evidence of the owner's lack of intention to dedicate.

Conclusions

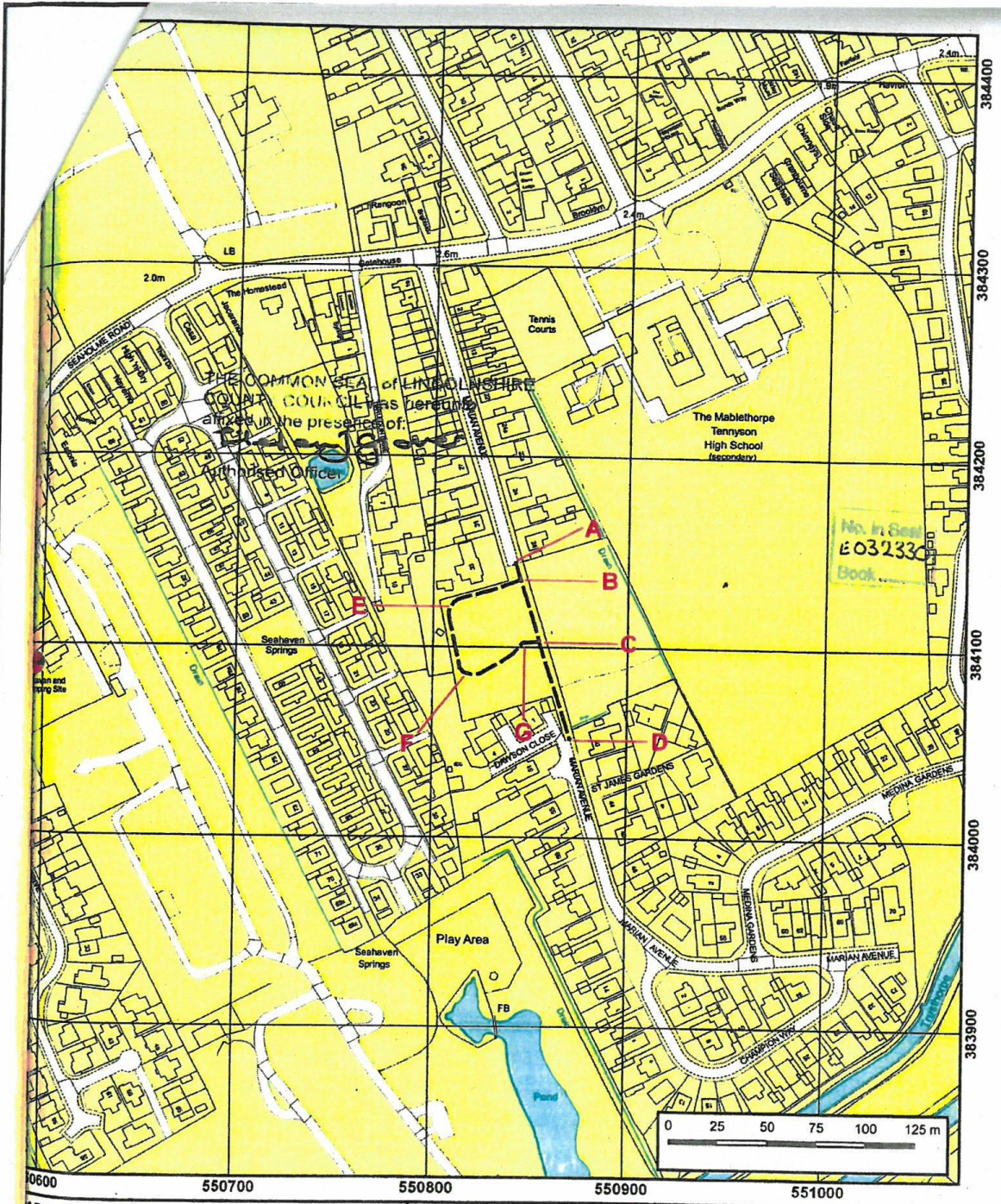
30. Having regard to these and all other matters raised in the written representations I conclude that the unconfirmed part of the Order should not be confirmed.

Formal Decision

31. I do not confirm the unconfirmed part of the Order.

Claire Tregembo

INSPECTOR



MABLETHORPE & SUTTON
 (Definitive Map Modification Order)
 Addition of Public Footpath 1165 running
 between the two sections of Marian Avenue and
 Addition of Public Footpath 1166 running in a
 loop from and to Public Footpath 1165

Lincolnshire
 COUNTY COUNCIL
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Countryside Services, County Offices,
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Legend

- A-B-C-D — Public Footpath No. 1165
- B-E-F-G-C — Public Footpath No. 1166

Drawing No.: 2019/026/DMMQ399/A4