



# Order Decision

Inquiry held on 11 November 2008

by **Alan Beckett BA, MSc, MIPROW**

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

The Planning Inspectorate  
4/11 Eagle Wing  
Temple Quay House  
2 The Square  
Temple Quay  
Bristol BS1 6PN

☎ 0117 372 6372  
email: [enquiries@pins.gsi.gov.uk](mailto:enquiries@pins.gsi.gov.uk)

**Decision date:**  
11 December 2008

## Order Ref: FPS/E0535/7/25

- 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. 11 St Neots) Definitive Map Modification Order 2007.
- The Order is dated 5 September 2007 and proposes to modify the Definitive Map for the area by deleting public footpath No 11 St Neots as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding at the commencement of the public inquiry.

**Summary of Decision: The Order is confirmed.**

## Preliminary Matters

1. I held a public local inquiry into the Order at the Priory Centre, St Neots on 11 November 2008 having viewed the path at issue the previous evening. I made an inspection of the Order path in the company of representatives of Cambridgeshire County Council ("the Council"), other supporters and objectors to the Order following the close of the inquiry.

## Background

2. The Council is engaged in a process of resolving a number of anomalies which it has identified within the definitive maps and statements produced by the former counties of Huntingdonshire, Cambridgeshire and the Isle of Ely in preparation for the publication of a consolidated definitive map and statement for the current administrative county of Cambridgeshire. Anomalies have been identified in the recorded path network in St Neots in general with several being in the vicinity of the site occupied by Longsands Community College.

## The Main Issues

3. The Order was made because the Council concluded that, on the basis of the evidence discovered and all other relevant evidence available, on the balance of probabilities there is no public right of way over the route in question. The Council submitted that a right of way had formerly existed but was extinguished prior to the relevant date of the current definitive map, and that no new right of way has come into existence since. In the light of the submissions made at the inquiry and the evidence I heard, I find that the main issues are:
  - whether any right of way which formerly existed was lawfully extinguished prior to the relevant date of the current definitive map;
  - whether re-dedication of the right of way took place in the interval between the extinguishment and the relevant date of the definitive map;

- whether the way can be deemed to have been dedicated to the public during the period when it has been shown as a right of way on the definitive map.

## Reasons

### ***Whether any right of way which formerly existed was lawfully extinguished prior to the relevant date of the current definitive map***

4. In considering the evidence relating to the Order I am guided by the findings of the Court of Appeal in the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 3 All ER ("*Trevelyan*") and especially the following passage at paragraph 38:

*"Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on the definitive map in fact exists he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that a right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance if it is to outweigh the initial presumption that a right of way subsists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*

5. In *Trevelyan* the Court also quoted with approval guidance which had been published in Department of the Environment Circular 18/90. The guidance stated that it was for those who contended that there was no right of way to prove that the definitive map was in error and that a mistake had been made when the right of way was first recorded; it also stated that the evidence needed to remove a right of way from the record would need to be cogent, and that it was not for the authority to demonstrate that the map was correct.
6. Circular 18/90 has since been replaced by defra Rights of Way Circular 1/08 which contains guidance that I have also taken into account in reaching my decision. Circular 1/08 says at paragraph 4.4: "*The conclusive evidential effect of definitive maps and statements means that where it is claimed that a way shown on the map ought not to be there, or ought to be there but of a lower status, the evidence must show that no right of way existed or that a right of way is of a lower status than that shown at the relevant date of the definitive map on which the way was first shown. The authority does not have to prove that the map is correct. New evidence must have been discovered which, when considered with all other relevant evidence, shows that a mistake was made when the right of way was first recorded in the definitive map and statement. The evidence may relate to some evidence after the relevant date such as twenty years uninterrupted use, or may relate to information which was available at the relevant date e.g. an inclosure award, but which was not taken into account when the map was prepared.*"
7. It was the Council's case that an error had been made in the compilation of the current definitive map for the area and that the Order route should not have

- been so shown. Two public path orders were submitted by the Council as evidence that at the relevant date<sup>1</sup> of the revised definitive map (14 December 1961) there had been no right of way on the alignment of footpath 11.
8. The order made by the Minister for Local Government and Planning on 21 February 1951 provides evidence that a public right of way existed across the site of Priory Hill Infant School and what is now Longsands Community College before the site was developed for educational purposes. Prior to 1951 the path ran from Kings Road over an open site in a north-easterly direction to Priory Hill House but on an alignment to the south-east of the Order path. The 1951 order diverted the line of this footpath to run from Kings Road to B via A. A public right of way on foot between A and B therefore came into being in February 1951 by means of the order as opposed to it having come into existence through long use by the public. This path was recorded as footpath 11 in the first definitive map and statement which had a relevant date of 9 September 1953.
  9. The second order submitted by the Council was made by the Minister for Housing and Local Government on 30 August 1961 ("the 1961 order") following a public inquiry. The 1961 order provided for the extinguishment of footpath 11 and the provision of an alternative right of way on foot on the alignment of footpath 11a. The Council submitted a copy of the 1961 Order, a copy of the notice of the Minister's decision following the public inquiry which was received by Huntingdonshire County Council on 14 July 1961 and a copy of the notice of the order published in the Hunts Post on 12 September 1961 as evidence that the correct procedures had been followed. I accept that this was so.
  10. The revised definitive map shows the line of footpath 11a running between Huntingdon Road and point B, with the continuation path to Monks Hardwicke Road being shown as part of footpath 11. In addition, the Order path between the eastern end of Almond Road and point B is also shown although the public right of way over this route had been extinguished some three months earlier.
  11. Although the revised definite map shows both footpath 11 and footpath 11a, the revised definitive statement only refers to footpath 11. The description of footpath 11 reads: "*Starts on the Huntingdon Road to the north of the Swimming Pool and runs in an easterly direction and then in a north-easterly direction round Priory Hill Park to its termination on the Monks Hardwicke Road on Priory Hill*". This is a description of footpath 11a created as part of the 1961 order and that part of footpath 11 unaffected by the 1961 order.
  12. The 1961 order provides cogent evidence that any public right of way on foot in existence over footpath 11 was lawfully extinguished on 30 August 1961.

***Whether re-dedication of the right of way took place in the interval between the extinguishment and the relevant date of the definitive map***

13. Although the public right of way along footpath 11 was extinguished on 30 August 1961, it would have been possible for a public right to have been acquired again prior to 14 December 1961 such that the revised map was an accurate record of the public's rights at the relevant date. If re-dedication had occurred, it could not have done so under statutory dedication through long

---

<sup>1</sup> The definitive map provides conclusive evidence of the existence of the public right shown in it at this date

- use as the three months between August and December 1961 is too short a period to satisfy the provisions of section 31 of the Highways Act 1980 ("the 1980 Act") or the relevant sections of preceding legislation.
14. However, there is no prescribed minimum period of use for dedication of a right of way at common law. Dedication at common law by the owner of the land can either be express or can be implied from the actions of the owner with use by the public being evidence of the acceptance of the dedication.
  15. There is no evidence of an express dedication of a right of way by the landowner following the making of the 1961 order. I note from the documents submitted by the Council that the draft order had been published in March 1960; that a public inquiry into the order was held in January 1961, and that the Minister for Housing and Local Government had considered the report of his inspector before making the order on 30 August 1961. Given that the owner of the land (in this case the local education authority) had engaged in a formal process over a period of at least eighteen months to secure the closure of footpath 11 to facilitate the better management of the school site, I consider it highly improbable that the owner would have intended to re-dedicate the footpath immediately following its formal extinguishment.
  16. I heard from Mr Durham and Mr Stanley as to their use of the route during the early 1960s both as individuals and in the company of members of their families; neither witness provided a figure as to the number of times that they had walked the route in late 1961, and given that this would require an accurate recollection of the frequency of use which took place almost 50 years ago, this is unsurprising. I accept however, that both Mr Durham and Mr Stanley are likely to have walked the Order path on some occasions in the autumn and winter of 1961, but I do not consider the direct evidence of use of two individuals to be sufficient to show the acceptance by the public of a re-dedication, even if there was evidence from which a re-dedication could be inferred.
  17. There is no evidence before me that demonstrates, on a balance of probabilities that the owner of the land intended to re-dedicate a public right of way over footpath 11 before 14 December 1961. Accordingly, I conclude that the documentary evidence adduced by the Council is cogent and is of sufficient substance to outweigh the initial presumption that footpath 11 subsisted at the relevant date of the revised definitive map.
  18. That footpath 11 was shown to be in existence on the revised definitive map is evidence that, on a balance of probabilities, an error was made in marking part of footpath 11 on the revised map.
  19. As there is no evidence which would have made it even reasonably arguable that a right of way existed over footpath 11 at the relevant date of the revised definitive map, it follows that footpath 11 should not have been shown on that map.

***Whether the way can be deemed to have been dedicated to the public during the period when it has been shown as a right of way on the definitive map.***

20. Circular 1/08 states at paragraph 4.13; "*In the case of deletions, guidance in Circular 2/93 Annex B previously indicated that, on a way that had been incorrectly shown on the definitive map, a case for deemed dedication could be established on the basis of use in the period between the first recording of the way on the definitive map and its subsequent removal. defra now believes this advice to have been wrong and is now of the view that it is not possible for a right of way to have been dedicated as a right of way for the purposes of section 31 of the Highways Act when use of the way is by virtue of it already being shown in the definitive map. defra's view is that use of the way in such circumstances can no longer be seen to be as of right, as rights that cannot be prevented cannot be acquired.*"
21. It was submitted by the Council that the guidance contained in paragraph 4.13 of Circular 1/08 offered no explanation as to why there had been a change of view from the guidance previously offered by Annex B of Circular 2/93. Nonetheless, it was submitted that if I were to agree with the submission made by Mr Fovargue on behalf of the objectors that the previous guidance should prevail, the reasoning for doing so should be fully set out as part of my decision.
22. It was Mr Fovargue's case that if the right of way over the Order route had been extinguished in August 1961, there was sufficient evidence of use of the path by members of the public since that date for a right of way to have been deemed to have been dedicated under the provisions of section 31 of the 1980 Act. For the purposes of the 1980 Act, it was considered that use had been called into question in 2007 when the Order had been published. Mr Fovargue considered that the guidance offered by Annex B of Circular 2/93 should prevail and that on the evidence of use, footpath 11 should be retained.
23. I heard evidence of use of the Order route from nine individuals. The earliest use claimed occurred in 1945 and such use had continued until the present time. None of the individuals who spoke had been challenged or turned back, and use had been open to view by the school management and staff. All the witnesses had observed or met other members of the public walking along the path between the trees. I also heard that from the 1980s (possibly as early as 1982 but equally possibly as late as 1988) fencing had been erected between the school site and footpath 11a at point B which meant that direct access to footpath 11a had not been possible. I heard that this fence had been broken down in various places but had been renewed in the 1990s and again as recently as 2003 or thereabouts.
24. The recollections of the witnesses with regard to the specific dates that the fence had been erected and renewed were imprecise, but the evidence was clear that a fence had prevented direct access to footpath 11a from the Order route and had caused users to deviate from the northern end of the avenue to a gap in the fence opposite the path leading through Priory Hill Park approximately 57 metres to the west of B. The Council submitted that if the user evidence had given rise to a new right of way it could not have been

- wholly on the Order route as during the relevant period the fence had prevented a direct connection being made with footpath 11a.
25. The oral evidence I heard was of regular use of the path for recreational and utilitarian purposes as a link between different parts of the town. However, I agree with the Council that it is unlikely that for significant parts of the 20-year period prior to 2007 the public would have found it possible to exit directly onto footpath 11a at B due to the presence of a fence. I have no doubt that use has been made of a substantial part of the Order route, which, were it not for the fact that the path was already shown on the definitive map, may have been sufficient to raise a presumption of dedication of a right of way over it.
  26. Whereas Mr Fovargue considered that the guidance offered by the Circular 2/93 should prevail, he provided me with no argument as to why the guidance found in Rights of Way Circular 1/08 was wrong or should not be followed. Circular 2/93 and the guidance contained within it were cancelled on the publication of Circular 1/08. The current guidance contained in Circular 1/08 is such that any use of footpath 11 after the relevant date of the revised map cannot be considered to have given rise to deemed dedication because the public had a right to use the path by virtue of the path being recorded in the definitive map, and such use cannot lead to a claim for that use being as of right.
  27. I acknowledge that some of the witnesses at the inquiry stated that they used the path because it was there, because they had seen others doing so and that they had no knowledge that the path had been marked on the definitive map. However, the state of awareness of the user does not negate the fact that the Order route is marked on the definitive map and formally recorded therein as a public right of way. Any use, regardless of the state of knowledge of the users, occurred throughout the period that the path was recorded in the official record.
  28. Section 56 (1) of the 1981 Act states that "*where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot...*". In both the *Trevelyan* case and the case of *R (oao Norfolk County Council) v Secretary of State for Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin) the courts held that the definitive map was the primary document which provided conclusive evidence of the existence of a public right of way until such time a review under Section 53 is undertaken.
  29. It is only the review process undertaken by the Council that has unearthed the evidence to show that the map is incorrect. Irrespective of the conclusion I have reached as to an error having been made in the recording of footpath 11, the conclusive evidential effect of the definitive map is such that a right of way over the Order route was shown to be in existence at 14 December 1961, and until the current Order is confirmed, it still exists. Any use between 1961 and the present time could not have been prevented and cannot lead to the dedication of an equivalent right of way at either statute or common law. Accordingly, I cannot take into account any use of the path on foot after 14 December 1961.

### **Other matters**

30. In their written submissions some objectors expressed their concerns that potential of future development of land which currently forms part of the school site would impact upon the existing footpath network or would pose a threat to the continued existence of the lime trees as a feature in the local landscape. These are not matters within my remit and I have not taken them into consideration in reaching my decision.

### **Summary**

31. I am satisfied that, on a balance of probability, the evidence discovered by the Council shows that an error was made in the compilation of the revised definitive map for the area. The error was that in preparing the revised map, the line of footpath 11 was shown on an alignment where public rights had been stopped up by due process on 30 August 1961. I therefore conclude that the Order path should be deleted from the Council's revised definitive map.

### **Conclusion**

32. Having regard to these and all other matters raised both at the inquiry and in the written representations, I conclude that the Order should be confirmed.

### **Formal Decision**

33. I confirm the Order.

*Alan Beckett*

Inspector

APPEARANCES

**In support of the Order:**

Mr R Carr                      Principal, Robin Carr Associates instructed by the Director of Highways and Access, Cambridgeshire County Council, Shire Hall, Castle Hill, Cambridge, CB3 0AP.

who called:

Miss A Hodges                Senior Map Development Officer, Cambridgeshire County Council, Shire Hall, Castle Hill, Cambridge, CB3 0AP.

Mr R Whatmough            Principal, Longsands College, Longsands Road, St. Neots, PE19 1LQ.

**Opposing the Order:**

Mr A J Fovargue             2 Woodlands, St. Neots, PE19 1UE.

Who called:

Mrs F Lockett                3 Woodlands, St. Neots, PE19 1UE.

Mr B Durham                 11 Clover Road, St. Neots, PE19 8HD.

Mr P Stanley                 5 Kings Road, St. Neots, PE19 1LF.

Cllr A Cummings            11 Huntingdon Road, St. Neots, PE19 1DU.

Mrs V A Freeman            1 Waterloo Drive, Eynesbury, St. Neots, PE19 2NG.

Mrs M Chambers            81 Longsands Road, St. Neots, PE19 1TN.

Mr D S Moss                 39A Kings Road, St. Neots, PE19 1LD.