



# Order Decision

Site visit made on 27 January 2010

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

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

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Decision date:  
**05 FEB 2010**

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## Order Ref: FPS/U1050/7/24

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Derbyshire County Council (Public Footpath No 17 – Parish of Little Eaton) Modification Order 2003. It was sealed on 30 January 2003.
- The Order proposes to add to the Definitive Map and Statement a footpath forming a continuation of Footpath No 17 running from the east side of Duffield Road Industrial Estate service road to Ford Lane, Little Eaton, as detailed on the Order Map and Schedule.
- There was 1 objection outstanding when Derbyshire County Council, the Order Making Authority (OMA), submitted the Order to the Secretary of State for Environment, Food and Rural Affairs.

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

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### Preliminary Matters

1. I made a site inspection on Wednesday 27 January 2010 accompanied by representatives of the objector and the OMA when I was able to view the whole of the Order route.
2. In writing this decision I have found it convenient to refer to points on the claimed footpath as shown on the Order Map. I therefore attach a copy of part of the map which indicates the route and the points to which I refer.

### 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.

### Reasons

#### *Documentary Evidence*

4. In the course of investigating this case the OMA examined a number of documents. Several early ones were either not available or did not indicate the Order route.
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### *Early Maps*

5. The earliest available map which may show the route is Sanderson's Map (1835). This shows a single solid line running on the approximate line of the route but, it is not clear from the copy I have seen that this is intended to represent a footpath or a route of any sort and, on behalf of the objector, it is suggested that it may represent a water course.
6. Ordnance Survey (OS) maps from 1843 onwards show the route depicted by parallel dashed lines and annotated "F.P." according to the OMA. I have not seen copies of these maps but their depiction of the Order route does not appear to be a matter of dispute between the parties. However, although OS maps can be regarded as good evidence of the existence of routes on the ground at the time they were surveyed, they do not indicate the status of them. Most such maps in fact include a disclaimer to the effect that routes shown are not necessarily public rights of way.

### *The Definitive Map*

7. It is stated by the OMA that the claim submitted by Allestree Parish Council in connection with the preparation of the first Definitive Map of the area included the Order route. The claim submitted by Little Eaton Parish Council apparently also included the route even though it was not within that parish. This claim was based on a survey undertaken in 1950 and it was stated that the route had then been subject to 50 years of uninterrupted public use. It was described as having had a squeeze stile at the Allestree parish boundary (near Point A) and a further stile where it exits onto Ford Lane (Point B).
8. According to the OMA the route was then included on the draft map for the Belper Rural District as Footpath No. 8 Allestree and described in the accompanying statement as "*Footpath from Ford Lane Level Crossing (362401) in NE direction to Parish Bdy. (363406)*" being approximately 0.323 miles long with a grass surface and 2 stiles. The continuation of the route northwards was shown on the draft map for South East Derbyshire (formerly Shardlow) Rural District as Footpath No. 17 Little Eaton and the accompanying statement to this map described the path as continuing southwards to Ford Lane. These draft maps and statements were made available for public inspection and there is no record of any objection having been raised to the inclusion of the route. Again, I have not seen copies of these documents but their content is not a matter of dispute between the parties.
9. The Definitive Map and Statement for South East Derbyshire were published in 1967 and include Footpath No. 17 Little Eaton terminating at the parish boundary (Point A). There is no reference to the footpath continuing to the south of this point in the adjoining district.
10. In 1968, local authority boundaries in the area were altered and, in particular, that part of the Parish of Allestree (in Belper Rural District) crossed by the Order route was transferred to the Parish of Little Eaton (in South East Derbyshire Rural District).
11. The Definitive Map and Statement for Belper were published in 1973 and, even though the relevant date was 1953, well before the 1968 boundary change, no

paths formerly in the Parish of Allestree were referred to, including the Order route.

12. The OMA argues that the omission of the Order route from the Definitive Map and Statement was probably an error resulting from confusion caused by the boundary changes which can now be rectified by confirmation of the current Order. On behalf of the objector it is argued that there is no evidence to suggest that all the information now referred to was not available when the Definitive Map was produced and it cannot therefore be presumed that the Order route was omitted in error. It is also pointed out that the Ministry of Town and Country Planning Circular 91/50, relating to the preparation of definitive maps, stated that *"borderline cases should be decided in favour of inclusion rather than omission at the first stage"*.

#### *Conclusions with regard to Documentary Evidence*

13. OS maps provide good evidence that a footpath existed along the Order route for a considerable period and the parish claims made on behalf of both Allestree and Little Eaton Parish Councils in the early 1950s and the inclusion of the route on the draft map for Belper Rural District suggest that by that time the route was regarded as a public right of way. The omission of the Order route and other paths formerly in the Parish of Allestree from the Definitive Map published in 1973 might have been an error resulting from confusion caused by the 1968 boundary changes but, on the other hand, may have been a deliberate act in response to some information no longer available. On the balance of probability, in the absence of any record of the inclusion of the Order route on the draft map having been objected to, it is my view that the most likely explanation is that an error was made.

#### ***Other Evidence***

14. The OMA refers to correspondence from 1964 on the parish files which refers to the Order route being obstructed by tipping operations and an unofficial alternative route having been provided by the owner of the land, Mr Hammersley. I have not seen a copy of this correspondence.
15. The OMA further states that in 1965 Mr Hammersley received permission to use the land for tipping of inorganic waste and also applied for permission to divert the footpath to enable this development to proceed. This application failed due to a technical defect and Mr Hammersley subsequently applied to the County Council for a diversion order under the Highways Act 1959. This proposed diversion was objected to by the Derbyshire Footpaths Preservation Society on the grounds that the proposed alternative route was unsatisfactory and the Rural District Council resolved that the owner would be required to comply with the conditions of his planning permission to restore the land after tipping to a condition that would accommodate the footpath. The application was therefore subsequently rejected by the County Council. I have not seen copies of these applications but note that this evidence is not disputed and that the OMA has offered to provide copies of correspondence if required.
16. A letter dated 5 January 1965 is said to have been sent by a local resident who had lived on Ford Lane since 1938 and regularly used the Order route. Also, a file note from a site visit made on 12 April 1965 is referred to as describing the route as reasonably defined throughout its length except for an area of tipping

close to Ford Lane. It is also said to refer to a conversation with a Mrs Harlow, a regular user of the path who had said that Derby Running Club used the route most weekends. I have not seen any of these documents.

17. Copies of two notes relating to interviews carried out in 1965 were submitted by the OMA. These are both headed "*Note for Mr Hutchins*" and initialled "*CAH*". I have no information regarding the positions of Mr Hutchins or CAH although the OMA suggest that CAH was an officer of the council. One of these notes records that Mrs Harlow, a local resident, had counted 25 persons using Footpath No. 8 Allestree (the Order route) on 16 April 1965 (Good Friday) and a similar number on 17 April. The second note refers to a letter of complaint relating to obstruction of the footpath that had been sent by a Mr Robinson, another local resident, on 1 August 1965. CAH reported that he had walked with Mr Robinson to the Ford Lane end of the path (Point B) and observed overgrowth of vegetation immediately inside the stile. Mr Robinson had then pointed out an alternative access point some 20 yards (18.3 metres) to the east which he had used to avoid the obstruction. Mr Robinson had apparently been advised that steps to divert the path were in hand to a line as commodious as the original route.
18. Copies of photographs, some of which are labelled with dates in 1965 were also submitted. These purport to show Footpath No. 8 Allestree and include images of several stiles and a finger post sign stating "*Public Footpath to Allestree*". However, the copies I have seen were of poor quality and I was not able to verify on site the locations from which they were taken, although this is perhaps not surprising as the appearance of the area has changed greatly since 1965 as a result of tipping operations.
19. A further point is that Footpath No. 17, Little Eaton is currently a cul de sac path ending at a point (Point A) where there is no feature which can be regarded as an appropriate terminus for a public right of way nor is there any evidence that such a feature has existed at any time in the past. Such situations are however not unknown and can arise as a result of a number of circumstances although the indications from the parish claims would seem to suggest that it was believed at the time they were made that the path continued into the parish of Allestree.

#### *Conclusions regarding Other Evidence*

20. The evidence relating to attempts to divert the route, the admittedly limited evidence of public use and the existence of Footpath No.17, Little Eaton as a cul de sac tend in my view to reinforce the conclusion that the Order route had become a public footpath by the time it was included in the draft map for Belper and that its subsequent omission from the Definitive Map was probably an error.

#### **Other Matters**

21. It is argued on behalf of the objector that the authority has not in fact discovered any new evidence in this case. All the key evidence dates from before 1973 when the Definitive Map and Statement for Belper were published and may well have been taken into account when the Order route was omitted. It is therefore suggested that there can now be no justification for a modification to be made under Section 53(3)(c)(i) of the 1981 Act. The OMA's

- response to this is that it has been held, for example in the *Mayhew* case<sup>1</sup> that evidence does not necessarily have to be new and fresh in order to constitute an appropriate "event" for the purpose of the 1981 Act. The OMA's case to a large extent rests on the contention that the available evidence was not in fact considered (or was not properly considered) when the Definitive Map was drawn up, presumably because the area crossed by the Order route was no longer within the same authority. This being the case, it is argued that it is appropriate that, having discovered this error, the authority should make a modification order. In my view, this is a reasonable interpretation of the legislation as it is in fact the OMA's duty to maintain the Definitive Map as accurately as possible.
22. It is further argued on behalf of the objector that, as the evidence upon which the OMA relies was available before the commencement date of the 1981 Act (28 February 1983), the Order should have been made under Section 53(2)(a) rather than 53(2)(b). However, in my view the relevant "event" in this case was the discovery by the authority that evidence had not apparently been considered when the Definitive Map was produced and that this event occurred after 1983.
23. The Order describes two stiles on the Order route, one at Point A and one about 40 metres to the south-west of it. The OMA states that these stiles were present when the path was surveyed for the purpose of preparing the Order. They do not exist at present. The parish claim for Little Eaton describes two stiles on the path, one at the parish boundary (near Point A) and one at Ford Lane (Point B). There are also other references in the evidence to a stile at Ford Lane. It is my view that, if the Order route is a public right of way, it became such as a result of public usage before the 1950s when the parish surveys were carried out. There is no evidence available to suggest that the stile 40 metres to the south-west of Point A referred to in the Order was present on the route in this period and therefore no justification for including it in the Order. On the other hand there is some evidence that there were stiles near Point A and at Point B and it would seem appropriate to include these as limitations on public use of the route. I therefore propose to modify the Order accordingly.
24. On behalf of the objector it is pointed out that the column in Schedule II of the Order that includes reference to stiles on the route is headed "Remarks" rather than "Limitations". I do not think that this is in any way prejudicial to the Order or the interests of any party. This schedule is headed "Modification of Definitive Statement" as required by regulation and I assume it is set out in the same manner as the Definitive Statement itself.
25. The Order does not include a description of the width of the Order route and no evidence has been presented to indicate what the width is. Nevertheless, current advice states that widths should be included in Orders such as this and in circumstances where no evidence is available a width appropriate to the likely use of the route should be specified. In this case a width sufficient to allow two users to pass each other in comfort would seem to be appropriate and it is suggested by all parties that a width of 1.8 metres is reasonable for this purpose. I therefore propose to modify the Order to specify this width.

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<sup>1</sup> *Mayhew v Secretary of State for the Environment* [1992]

26. In the Schedule to the Order, Part I, the grid reference given for Point A is incorrect; it should be SK 36319 40589 not SK 36316 40585. I do not believe this error has misled any party or prejudiced their interests as the description in the Order and the Order Map clearly identify the Order route. However, I propose to modify the Order to correct this error and prevent any confusion arising in the future.

### **Overall Conclusions**

27. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed, subject to the modifications I have referred to earlier.

### **Formal Decision**

28. I propose to confirm the Order subject to the following modification:

In the Schedule to the Order, Part I, amend the grid reference given for Point A to SK 36319 40589 not SK 36316 40585;

In the Schedule to the Order, Part II, add alongside the description of the Order route the width *"1.8 metres"*;

In the Schedule to the Order, Part II, delete the reference to a stile at grid reference 36300 40556 and add reference to a stile at grid reference 36195 40089.

29. Since the proposed modification to specify the width of the route might affect land not otherwise affected by the Order, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981, to give notice of the proposal to modify the Order and to give the opportunity for objections and representations to be made to the proposed modification. A letter will be sent to interested persons about the advertisement procedure.

*Barney Grimshaw*

**INSPECTOR**

MAP NOT TO ORIGINAL SCALE

