

CULTURE, LEISURE AND TOURISM PORTFOLIO DECISION SCHEDULE



Monday 21st January 2008

at 10.00 a.m.

**in the Red Room, Avondale Centre,
Dyke House, Hartlepool
(Raby Road entrance)**

Councillor Tumilty, Cabinet Member responsible for Culture, Leisure and Tourism will consider the following items.

1. KEY DECISIONS

No items

2. OTHER ITEMS REQUIRING DECISION

No items

3. REPORTS FOR INFORMATION / DISCUSSION

- 3.1 Wildlife and Countryside Act 1981. Appeal under Paragraph 4(1) of Schedule 14 by Mr D McDonald against the decision of Hartlepool Borough Council not to modify the definitive map and statement by the addition of a footpath between Manor Road and Elwick Road, Hartlepool – *Director of Adult and Community Services*

4. REPORTS FROM OVERVIEW OF SCRUTINY FORUMS

No items

CULTURE, LEISURE AND TOURISM PORTFOLIO

Briefing Report to Portfolio Holder

21st January, 2008



Report of: Director of Adult and Community Services

Subject: WILDLIFE AND COUNTRYSIDE ACT 1981.
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE
14 BY MR D MCDONALD AGAINST THE DECISION
OF HARTLEPOOL BOROUGH COUNCIL NOT TO
MODIFY THE DEFINITIVE MAP AND STATEMENT
BY THE ADDITION OF A FOOTPATH BETWEEN
MANOR ROAD AND ELWICK ROAD, HARTLEPOOL

SUMMARY

1. PURPOSE OF REPORT

To brief the Portfolio Holder as to the background of the final decision made by the Secretary of State for the Environment, Food and Rural Affairs on the appeal against the Council's decision not to modify the Definitive Map and Statement.

2. SUMMARY OF CONTENTS

In early 2005, Parks and Countryside Section received an application to modify the Definitive Map and Statement.

After 12 months investigation and research, a determination to refuse the making an order to modify the Definitive Map and Statement was finally approved by Planning Committee on 5th July 2006.

An appeal against this decision was immediately launched by the original applicant, with a determination from the Secretary of State for Defra being received on 11th October 2007. **(See Appendix 1).**

The determination fell in favour of the applicant with instruction made to the Council to make an order to add the claimed path, as a public footpath, to the Definitive Map and Statement.

The Council is required to carry out this within a reasonable time and to then notify the Secretary of States office upon completion.

It is likely that, during the Order making process, representations will be made by parties opposed to the Order.

The Secretary of States office will consider any such representations and either confirm the Order, with or without modifications, or will order a public Inquiry to be held to make final decision on this matter.

3. RELEVANCE TO PORTFOLIO MEMBER

Portfolio Holder has responsibility for Countryside and Parks

4. TYPE OF DECISION

Non-Key

5. DECISION MAKING ROUTE

Culture Leisure and Tourism – 21 January 2008

6. DECISION(S) REQUIRED

That the Portfolio Holder notes the contents of the report

Report of: Director of Adult and Community Services

Subject: WILDLIFE AND COUNTRYSIDE ACT 1981.
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE
14 BY MR D MCDONALD AGAINST THE DECISION
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MODIFY THE DEFINITIVE MAP AND STATEMENT
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MANOR ROAD AND ELWICK ROAD, HARTLEPOOL

1. PURPOSE OF REPORT

- 1.1 To brief the Portfolio Holder as to the background of the final decision made by the Secretary of State for the Environment, Food and Rural Affairs on the appeal against the Council's decision not to modify the Definitive Map and Statement.

2. BACKGROUND

- 2.1 On 25th February, 2005, Parks and Countryside Section received a request for an application pack to modify the Definitive Map. The pack was requested by a local resident. Parks and Countryside received the completed application on 23rd March, 2005.
- 2.2 From 23rd March, 2005 to 27th April, 2006, an investigation was carried out to check all evidence, wherever possible, that was relevant in showing the existence and status or non-existence of the route. This included checking the supplied user evidence to see if there were any inconsistencies. Any such were then rechecked with the individual who supplied the information.
- 2.3 On 7th June, 2006 and 5th July, 2006, the Planning Committee deliberated and made a determination refusing to make an order to add the claimed path onto the Definitive Map and Statement.
- 2.4 On the 24th July, 2006, the Claimant then appealed against this decision, to the Secretary of State for the Environment, Food and Rural Affairs.
- 2.5 A final determination by the Secretary of State for the Environment, Food and Rural Affairs was made on 11th October, 2007. **(See Appendix 1)**. The determination was made in favour of the appellant and the Council was instructed to make an order to add the claimed path as a public footpath, to the Definitive Map and Statement. The Council was also instructed to notify the Secretary of State's office when the order was made, in compliance with the direction, been made.

- 2.6 The Council's Legal Section has now been instructed by Technical Services, under their delegated powers to make such an order. This Legal Section will have to do in a reasonable time frame, as there is an expectation from the appellant et al, that we will proceed with modification

3. IMPLICATIONS

- 3.1 Once the order has been made, any aggrieved persons can appeal against the order within 42 days of the order being made. In this case, it would be expected that the aggrieved person could be the Landowner, who objected to the application from the start.
- 3.2 The order will then be sent to the Secretary of State for the Environment, Food and Rural Affairs for confirmation, along with any representations made by any aggrieved persons. The Secretary of State's office will then decide whether to proceed with the confirmation, with or without modifications, or to consider the representations.
- 3.3 If the order is confirmed, then a further 42 days is given for any representation to be made to the High Court before the confirmed order can be activated.
- 3.4 If the Secretary of State considers the representations, it will either be through public hearing or public enquiry. At either of these types of meetings, a Planning Inspector would preside and make a final determination. The Council would not take any side but remain, as it has at all times, neutral.

4. COST IMPLICATIONS

- 4.1 At such a hearing or inquiry, the Council would have to pay the full costs for the setting up and hosting of such a meeting.

5. RECOMMENDATIONS

That the Portfolio Holder notes the contents of the report.

CONTACT OFFICER: Chris Scaife, Countryside Access Officer

Background Papers

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Email: Julie.HUME@gone.gsi.gov.uk

Your ref: ROW/DMMO/001/05
Our ref: NATROW/H0724/529A/06/92

Date: 11 October 2007

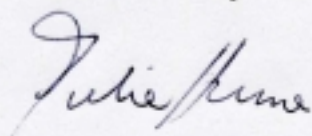
Dear Sir

**WILDLIFE AND COUNTRYSIDE ACT 1981
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
BY MR D McDONALD AGAINST THE DECISION OF HARTLEPOOL BOROUGH
COUNCIL NOT TO MODIFY THE DEFINITIVE MAP AND STATEMENT BY THE
ADDITION OF A FOOTPATH BETWEEN MANOR ROAD AND ELWICK ROAD,
HARTLEPOOL**

1. The Secretary of State for the Environment, Food and Rural Affairs has considered the appeal under paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 made by Mr D McDonald on 24 July 2006 against your authority's decision not to make an Order modifying the Definitive Map and Statement of public rights of way for the area by adding a public footpath running between Manor Road in the north and Elwick Road in the west. The claimed public footpath route is of some 135 metres length and commences on, and between properties 12 and 14, Manor Road and then travels in a south westerly direction, along a narrow pathway, to its junction with the access drive to properties known as Inglethorpe, Catcote House and Bradgate, where it turns west and proceeds to its junction with Elwick Road, opposite High Tunstall School (or College), the claimed footpath route being shown on the Annex B map which accompanies the Secretary of State's decision letter on the appeal.
2. The Secretary of State, having considered the appeal, considers that an Order should be made. A copy of the letter to Mr D McDonald is attached.
3. Accordingly the Secretary of State, under the powers contained in paragraph 4(2) of Schedule 14 to the Wildlife and Countryside Act 1981 and of all other powers enabling him in that behalf, hereby directs Hartlepool Borough Council to make an Order under Section 53(2) of, and Schedule 15 to, the 1981 Act to modify the Definitive Map and Statement for the area, as proposed in the application of Mr D McDonald dated 23 March 2005.

4. I would be grateful if the Council would notify this office when an Order has, in compliance with the direction, been made.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'Julie Hume', written in a cursive style.

JULIE HUME

Authorised by the Secretary of State for
the Environment, Food and Rural Affairs
to sign in that behalf

Enc:



defra

Department for Environment
Food and Rural Affairs

Mr D McDonald
2 The Crest
HARTLEPOOL
TS26 0ER

National Rights of Way Casework Team

Citygate
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NE1 4WH

Switchboard: 0191 201 3300
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Fax: 0191 202 3744

Email: Julie.HUME@gone.gsi.gov.uk

Your ref:

Our ref: NATROW/H0724/529A/06/92

Date: 11 October 2007

Dear Sir

**WILDLIFE AND COUNTRYSIDE ACT 1981
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
BY MR D McDONALD AGAINST THE DECISION OF HARTLEPOOL BOROUGH
COUNCIL NOT TO MODIFY THE DEFINITIVE MAP AND STATEMENT BY THE
ADDITION OF A FOOTPATH BETWEEN MANOR ROAD AND ELWICK ROAD,
HARTLEPOOL**

1. I am directed by the Secretary of State for the Environment, Food and Rural Affairs to refer to your appeal made under Section 53(5) of, and Paragraph 4(1) of Schedule 14 to, the Wildlife and Countryside Act 1981 against the decision of Hartlepool Borough Council ("the Council") not to make an Order modifying their Definitive Map and Statement for the area by adding a public footpath running between Manor Road in the north and Elwick Road in the west. The claimed public footpath route is of some 135 metres length and commences on, and between properties 12 and 14, Manor Road and then travels in a south westerly direction, along a narrow pathway, to its junction with the access drive to properties known as Inglethorpe, Catcote House and Bradgate, where it turns west and proceeds to its junction with Elwick Road, opposite High Tunstall School (or College), the claimed footpath route being shown on the attached Annex B map.

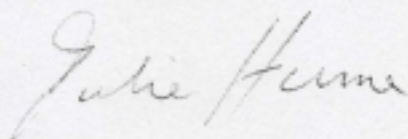
2. An Inspector, Helen Slade MA FIPROW, has carefully considered all the submissions made with regard to this appeal and has submitted her report to the Secretary of State. A copy of the Inspector's report is attached as Annex A to this letter. Your case as the appellant is set out in paragraphs 5 to 13 of the Inspector's report, with that of third parties in support of the appeal given at paragraphs 14 to 21. The case for the Council is given at paragraphs 22 to 37 of the report, with that of the landowners (of 'Inglethorpe') in support of the Council given at paragraphs 38 to 48. The Inspector, whose conclusions are set out in paragraphs 49 to 95 of her report, has recommended, at paragraph 96, that the appeal be allowed.



3. The Secretary of State agrees with the Inspector's conclusions and accepts her recommendation. Having taken all the arguments and representations presently before him into account, the Secretary of State has reached the view that an Order should be made. Therefore in accordance with the provisions of paragraph 4(2) of Schedule 14 of the Wildlife and Countryside Act 1981 he has directed Hartlepool Borough Council to make an Order, under Section 53(2) of, and Schedule 15 to, the Act modifying the Definitive Map and Statement for the area by the addition of a public footpath, as described in paragraph 1 above, as proposed in your application dated 23 March 2005. This decision is given without prejudice to any decision that may be given by the Secretary of State in exercise of his powers under the said Schedule 15.

4. A copy of this letter has been sent to Hartlepool Borough Council and to the third parties referred to in paragraph 2 above.

Yours faithfully



JULIE HUME

Authorised by the Secretary of State for
the Environment, Food and Rural Affairs
to sign in that behalf

Enc:



Report to the Secretary of State for Environment, Food and Rural Affairs

by Helen Slade MA FIPROW

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

The Planning Inspectorate
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Date: 6 August 2007

WILDLIFE AND COUNTRYSIDE ACT 1981

REPORT INTO AN APPEAL BY

MR D McDONALD

AGAINST THE DECISION OF

HARTLEPOOL BOROUGH COUNCIL

NOT TO MAKE AN ORDER UNDER SECTION 53(2)

IN RESPECT OF A CLAIMED PUBLIC FOOTPATH

BETWEEN

MANOR ROAD AND ELWICK ROAD, HARTLEPOOL

Annex A

Case Details

- This appeal is made by Mr D McDonald under Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Hartlepool Borough Council not to make a modification order under Section 53(2) of that Act.
- The application dated 23 March 2005 was refused by notice dated 20 July 2006.
- The appellant claims that the Definitive Map and Statement should be modified to show a public footpath running between Manor Road in the north and Elwick Road in the west.

Recommendation: I recommend that the appeal is allowed.

Preliminary Matters

1. I have been appointed to report to the Secretary of State for Environment, Food and Rural Affairs on the above mentioned appeal made in accordance with Paragraph 4 of Schedule 14 to the Wildlife and Countryside Act 1981 ('the 1981 Act').
2. The appellant's evidence consists of user evidence supported by a number of maps. I am satisfied that I can make a recommendation without the need to visit the site.
3. The report consists of the relevant points made in the submissions of the parties, an assessment of the evidence against the relevant criteria and my conclusions and recommendation.

Description of the Route

4. The claimed route commences between properties 12 and 14 Manor Road at its northern end. It passes south west along a narrow pathway to meet the access drive to properties known as Inglethorpe, Catcote House and Bradgate, where it turns to the west to meet Elwick Road opposite High Tunstall School (or College). The width is given as 1.2 metres (4 feet) where confined between the Manor Road properties and 2.74 metres (9 feet) along the access drive. The total length of the path is 135 metres.

The Case for the Appellant

The material points are:

5. A gate was erected at the northern end of the claimed route in 2000 as evidenced by an article in the local paper. A local resident was reported to be intending to raise a petition against the blocking of the route.
6. The claimed route has been used for well over 20 years but the Council has rejected the user evidence. One of the user witnesses is a policeman who used to patrol the area between 1971 and 1984 before his retirement. The appellant himself has lived in Crest Road since 1971 and another user witness has lived in the area for over 60 years. The witnesses have not lied and their evidence should have been given greater consideration.

7. The route has been used by the public, including six overlapping intakes of High Tunstall School. Residents, the police, the council and the school were aware of this usage. The school was opened in 1973 and the route was never barred to the pupils. None of the user witnesses has ever been prevented from using the route prior to the erection of the gate, and none of them has ever been advised verbally that they could not use it.
8. Hartlepool Borough Council ('the Council') was asked for approval for the erection of a barrier, and subsequently erected a chicane structure at the southern end of the narrow path at the expense of the residents. This demonstrates an acceptance of the use of the way by the public on foot by the Council, residents and the owner.
9. The reference in property deeds to a private footpath means that it was privately maintained (i.e. not taken over by the Council) and not that it was only for private use. All public footpaths traverse private land therefore it is not relevant that someone owns the land across which the claimed route runs.
10. The wooden gate which was in position along the path at the Elwick Road end was never locked and was heavy and overgrown with weeds. It would have taken two men to move it. It was replaced by a metal gate which was never closed. Until about 10 years ago there was a public footpath sign at the Elwick Road end of the path. Although the Council is unable to trace any record of it, there are many locals who recall it, including one of the former headmasters of the school. No-one has denied that it existed.
11. Ordnance Survey ('OS') maps NZ 43 SE and NZ4833SE show the route to be open at both ends and possibly paved. Part of the route was recorded as a public footpath before High Tunstall Comprehensive School was built.
12. Councillors making the decision were not made fully aware of the criteria of Section 31 of the Highways Act 1980 ('the 1980 Act'). There is no evidence that successive owners took strenuous efforts to deny access along the route. The gates were never closed and none of the user witnesses were challenged. Pupils from the school have used the path for more than 20 years. The six criteria that give rise to presumption of dedication have been satisfied. The evidence is overwhelming.
13. The photographs taken in 2005 have no relevance to the situation as it was in the previous century¹. Although safety issues are relevant they are not the reason for the claim, the basis for which remains prescription.

Material points from third parties in support of the appellant

Mr G Pearson: former Head Teacher of High Tunstall School

14. The route was in regular use by pupils of the school when Tunstall Court was used by the school for Arts and Music. Complaints were made occasionally by residents but Mr Pearson was reluctant to ban the use of it because it was convenient and safe.

¹ i.e. 20th century, during which the period of relevant use falls

15. He made occasional visits to the residents to check that they were not being unduly disturbed.
16. There was a sign saying 'Footpath' for some years. He cannot recall precisely whether the sign said 'Public' footpath, but he has never seen any other formal footpath sign which did not include the word 'public'. He does not know when the sign disappeared but as far as he was aware the route was a public footpath and still is.

Mr W A Siddell

17. Mr Siddell recalls the public footpath sign, and that the path was well used, mainly by pupils from High Tunstall School. He himself first used the path in 1988.
18. The information regarding the location of the private sewer is irrelevant because the sewer does not run along the line of the claimed route.
19. The provision for private access rights is superfluous in circumstances where public rights exist.

Mr M P Kavanagh

20. He has used the path occasionally over a period of over 30 years. He does not recall meeting anyone but is aware that it was used by some school children as an alternative way home.
21. He recalls a public footpath sign at Elwick Road end of the path. On one occasion when he found the gate locked (when he was viewing a bungalow which was for sale) he was curious and checked to see if the sign was still there. It was.

The Case for Hartlepool Borough Council

The material points are:

22. The claimed route crosses land which forms part of the property 'Inglethorpe'. It accords with the widths given in the evidence forms. There is currently a locked gate at the northern end of the path and keys are held by the owners, and by some of the residents of Manor Road. There is a chicane at the southern end of the narrow path, installed in the 1990s to prevent access by motorcycles and bicycles.
23. The applicant submitted evidence of use prior to the erection of the gate from himself and 11 other witnesses. One of these has subsequently withdrawn support for the claim.
24. There is no historical documentary evidence in support of the claimed route. Part of it first appeared on the 1897 OS map as a short track from Elwick Road to a pheasantry. Subsequent maps show it extended to form the access to the property now known as 'Westlands'. Current OS base maps show the physical existence of the route but cannot provide evidence of its legal status. It is not adopted by the Council.

25. Properties numbered 6-24 Manor Road were erected between 1960 and 1968. Land registry documents show that the residents were given private access rights by deed of conveyance.
26. An agreement was also made between the developer and the Borough of West Hartlepool (the relevant council at the time) in respect of the laying of foul sewers and access to them for maintenance (for which the council then assumed responsibility). The sewers are in private land and consequently the claimed route must also be on private land.
27. Correspondence on the Council files shows that during 1993-5 there was discussion about the erection of a chicane, which was subsequently erected by the Council at the expense of the residents. It was vandalised soon afterwards and repaired by the Council. The permission of the Council was necessary due to the existence of an agreement dated 29 November 1961 referred to in property deeds.² The owner of 'Inglethorpe' at that time gave permission for the structure, but did not contribute towards the cost of it.
28. The Council has no record of the public footpath sign alleged to have existed at the Elwick Road end of the claimed route.
29. With reference to the criteria for Section 31 of the 1980 Act, the date on which the right of the public to use the way was brought into question is taken as being 2000, the date on which the gate at the northern end of the path was first put up. There are a number of other events which could qualify since the 1960s, but the erection of the gate in 2000 clearly prompted a response. The relevant period is therefore 1980-2000.
30. Twelve witnesses claim usage of the way over varying periods from 11 to 40 years. The period during which usage is claimed extends from 1960 to 2004. All the witnesses claim usage on foot except for one person who claims to have used it on horseback. The purpose of the usage varies but much of it is related to recreation, although some witnesses used the route to take children to school. There is some recollection of various gates or barriers, but no-one claims to have been prevented or stopped from using the way. Some witnesses recall notices saying 'Private Drive', and some recall the existence of a public footpath sign. Several make reference to signs in 2002 indicating that the route was to be closed. Many refer to a gate being erected either 'recently' or in 2002. The bar chart of claimed use shows that five people claimed to be using the path in 1980 and nine people were using it in 2000.
31. Use of the way appears to have been made mainly by a handful of residents from The Crest and Warkworth Drive, and by some school children. Despite the low numbers these users do come from the general public and therefore constitute the public at large.
32. However, the evidence from the residents and the owners shows that use of the way has not been available for an uninterrupted period of 20 years. Evidence suggests that there were two gates in place along the route in the 1960s. One survived into the 1970s when a lock was added and keys given to

² The agreement would seem to be the one which related to the construction of the foul sewer, and restricted the nature of structures which could be placed over it.

the relevant residents. This gate, at the Manor Road end of the path, survived until 1988 when it was vandalised. It was not replaced until April 2000. The most recent gate, erected in 2002, has been locked since its installation.

33. The evidence also indicates that the usage has been challenged on many occasions, either physically (by blocking the route with a car) or by verbally challenging people climbing over gates or fences into private gardens. The residents of Manor Road have turned away youths and school children, and made complaints to the headmaster of High Tunstall School.
34. A former resident of Cresswell Court used the route between 1976 and 1981 whilst a pupil at High Tunstall Comprehensive School as it was the shortest and quickest route. He states that at that time anyone who was aware of the route referred to it as the 'Private Drive' and that the gate between Manor Road and the drive was locked. He and his friends regularly climbed over it, and were often apprehended by one of the residents on the drive. At first the gate was about 3 feet (0.9 metres) high, secured with a chain and padlock. Later it was replaced by a gate 6 feet (1.8 metres) high which was fitted with a mortise lock for which residents had a key. Many pupils continued to attempt to use the path, avoiding contact with any of the owners and climbing over the gate. They faced the prospect of Mr Pearson, the headmaster of the school, who regularly stood guard over the entrance to the drive to ensure people did not use that route. Staff and pupils at the school and residents alike considered the drive to be private and the gate was always locked.
35. Over the years, residents and owners have taken steps to demonstrate that there was no intention to dedicate a public right of way along the route. There have been notices in place at various times since the 1960s to date stating that the path was private. There is evidence that they were in existence between 1983 and 1987 and again after 1992. They have been positioned in various places: at Manor Road; at Elwick Road; at the southern end of the narrow alleyway section; and in adjoining residents' gardens.
36. Although the path is of a character capable of being a highway, and despite the use of it having been made by the public at large, the remaining criteria for Section 31 have not been satisfied. The available evidence shows that the route has not been available for an uninterrupted period of 20 years. Efforts have been made by successive owners to deny access, giving permissive access only to residents of Manor Road. The evidence of maps and photographs show that there was not intention to dedicate. Thus the way cannot be presumed to have been dedicated as a public footpath at statute.
37. Deemed dedication at common law cannot be satisfied because the owners have made strenuous efforts to prevent use of the way by the general public. There is no evidence of acquiescence by the owners and no period of time which would justify an inference of dedication. More weight must be given to single acts of interruption to usage, than to the acts of enjoyment of the way by the public, and the evidence supplied by the residents and successive landowners heavily outweighs the evidence of public use.

Material points from the landowner in support of the Council

38. Mr and Mrs Ainsley purchased their property ('Inglethorpe') in 1999³ and immediately began to experience problems with school children using the way. Requests were made by local residents to erect a new gate which was done in April 2000. Within weeks a resident of Cresswell Road contacted the local newspaper (the Hartlepool Mail) claiming that a petition was to be raised to keep the path open.
39. The previous owners of Inglethorpe until 1987/8 were Mr and Mrs Elder who state that there was always a gate in place until that time which was closed. There were also signs at both ends of the alleyway saying 'private'.
40. Evidence suggests that the pathway was originally left to facilitate access to Elwick Road by one of the original residents of the new houses in Manor Road who was the elderly mother of one of the developers. Access rights were granted by the developers to all the residents of the properties built at that time (early 1960s) in order to be fair.
41. A request was made in 1988 to the new owners of Inglethorpe (Mr and Mrs Longhorn) by one of the residents of Manor Road with regard to erecting a locked gate to replace one which had fallen out of repair. The Longhorns stated that their deeds were unclear about the extent of the rights to use the way and a letter from them indicated that it was possible that such an action might result in legal claims being made against them. They were aware that some members of the public used the route as a short cut. They suggested that the residents should indemnify the owners against any legal claim, but the terms were unacceptable to the residents and the gate was thus not replaced at that time.
42. Evidence obtained from local residents shows that two meetings took place with the solicitors of the previous landowners, Mr and Mrs Longhorn, to discuss problems with use of the way by the school children and youths attending the youth club held at the school. On 22 October 1996 a meeting was held between solicitors representing the residents and the owners, at the offices of Tilley, Bailey and Irvine. The main problem was the behaviour of children leaving the youth club and a proposal was made that the alleyway be purchased by the residents, who would form a Trust to manage it. The proposal fell through.
43. On 12 June 1997 a further meeting was held at the same solicitors' offices, but also attended by a number of the residents, the owners of Inglethorpe and representatives from the school and the youth club. The problems again were mainly caused by youths, and to a lesser extent by the schoolchildren. Various options were discussed for replacing the gates along the path, but the owners were reluctant to erect a gate at the Elwick Road end of the route (opposite the school) due to the inconvenience it would cause to residents accessing their drive in vehicles. The Longhorns acknowledged that no physical attempt had been made to stop the public using the pathway during their occupancy, even though they had no right to use it. The use of the path by the public had no

³ From Mr and Mrs Longhorn

impact on them as owners. The meeting resulted in a proposal from the Longhorns to close the path altogether, which was not acceptable to the residents. The situation therefore remained the same.

44. The residents of 14 Manor Road (adjacent to the alleyway) bought their property in 1992 and state that at that time there was a notice advising that the lane was private. From 1993 onwards they began to experience problems with youths, but Mr and Mrs Longhorn were unsympathetic to their problems. The gate fitted by Mr and Mrs Ainsley in 2000 was smashed, and a replacement was subsequently fitted.
45. The owners of 10 Manor Road state that the gate at the southern end of the alleyway was locked in 1983 and notices posted in the garden of 14 Manor Road indicating that it was a private right of way. A notice was also posted on Elwick Road to the same effect. The gate was vandalised in 1987 and numerous problems with school children ensued resulting in complaints being made to the Head Teacher. The route also provided an outlet for criminals. The new owners, the Longhorns, were not willing to replace the gate and solicitors were engaged. Nothing was forthcoming from this action. The situation only improved when the Ainsleys bought Inglethorpe and fitted a gate in 2000.
46. The residents of 19 Manor Road moved in during 1978, at which time the arrangements for access along the claimed route were carefully explained to them. A key was provided by Mr and Mrs Elder. In the early 1980s trouble started when pupils from the school began to use the route. Mrs Elder took photographs of the children and complained to the Head Teacher. After a period of quiet, the gate was vandalised in the late 1980s and usage by children and youths increased, accompanied by abusive language and behaviour. Usage by bicycles and motorbikes prompted the erection of barriers, and finally the replacement gate.
47. Residents of 8 Manor Road state that prior to 1987 the path was gated; a fact which could be confirmed by the former owners: Mr and Mrs Boyd and Mr and Mrs Elder. The path was trespassed for a maximum of 12 years and was policed by residents, who turned youths and children away after the gate was vandalised.
48. The resident of 3 Woodland Grove has owned the property for 38 years. When they bought the house, the owner of 'Inglethorpe' at that time refused permission for them to create an access onto the lane from the rear garden of their property on the grounds that the lane was private. Mr Dewar (the owner of 'Inglethorpe') later proved his ownership of the lane; put up notices saying 'private' and 'no thoroughfare' at both ends of the lane. He also bricked up the gateway which into the rear of 3 Woodland Grove. Mrs Boyd, a subsequent owner of 'Inglethorpe' blocked access to the lane with her car to stop usage, and turned people away.

Conclusions

Introduction

49. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act; the 1980 Act; the Department of Environment Circular 2/93 and relevant court judgments, the gist of which I set out below. References in square brackets refer to paragraph numbers in the cases of the parties set out above.
50. Section 53(3)(b) of the 1981 Act states that an order should be made to modify the definitive map and statement where it can be shown that a period of time has expired such that the enjoyment by the public of a path during that time raises the presumption that the way has been dedicated as a public path.
51. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue, there are two tests to be applied, as identified in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994], and clarified in the case of *R v Secretary of State for Wales ex parte Emery* [1997].
- Test A:** Does a right of way subsist? This requires that there is clear evidence in favour of public rights and no credible evidence to the contrary.
- Test B:** Is it reasonable to allege that a public right of way subsists? If there is a conflict of credible evidence but no incontrovertible documentary evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.
52. Section 31 of the 1980 Act states that where a way over any 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 calculated retrospectively from the date on which the right of the public to use the way is brought into question.
53. I have had regard to the recent decision in the case of *R (on the application of Godmanchester Town Council and Drain) v SSEFRA and others*⁴ (*Godmanchester and Drain*) in relation to evidence of a lack of intention to dedicate.
54. It is also possible for public rights to be established at common law. This requires the use of the way and the actions of the landowner to have been of such a nature that dedication of the way can be inferred or alternatively that express dedication can be shown to have occurred.
55. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant

⁴ [2007] UKHL 28

document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

Section 31 of the 1980 Act: Date on which the right of the public to use the way was brought into question

56. The action which appears to have prompted the application is the erection of a gate in 2000 [5]. Use of the way continued until the replacement gate was locked in 2002 [32]. Even though usage appears to have continued I agree with the Council that the date on which the public initially responded to their use of the way being interrupted is the earlier date of 2000 [29].

Whether use of the way has been by the public

57. The Council has accepted that use of the way has been made by the public, even though the claimants appear to come from a relatively small local area [31]. Anecdotal evidence of more extensive use by pupils from High Tunstall School appears to be acknowledged [14] [17] [20] [38] [42] [43] [45] and I thus agree that the use of the way has been by the public at large.

Whether the use by the public has been as of right

58. For use to be 'as of right' it must be demonstrated to have been exercised without force, without secrecy and without permission.

59. No evidence has been submitted of permission being sought or obtained by those parties who have completed user evidence forms. The evidence from the Head Teacher makes no reference to permission having been sought from the owners of the claimed route for its use by pupils to access the Arts and Music annex [14].

60. There is no evidence of use being made of the path in secret by those people who have completed evidence forms [30]. The residents and the owners appear to acknowledge that use has been made of the route by both schoolchildren, youths, and others [41] [43].

61. There is some evidence of use by force by some parties [34] [47]. However none of the witnesses who have completed user evidence forms acknowledge any difficulty with using the route [30]. There has thus been a proportion of usage which was exercised as of right, although the evidence that some users climbed over a gate cannot be ignored [34]. The former pupil providing this evidence left school in 1981 [34] and his ability to provide evidence for the relevant period of 20 years (1980-2000) is therefore limited.

Whether there has been use for an uninterrupted period of 20 years dating back from 2000

62. The evidence from the residents is consistent that there was a gate in position until 1987, which was then vandalised [45] [46] [47]. Some of the user witnesses acknowledge the existence of gates along the route, but claim that they were never closed, or at least never locked [30]. Although one resident claims that the gate at the southern end of the alleyway was locked in 1983 [45], Mrs Elders, who owned 'Inglethorpe' at that time, merely refers to the

gate being 'closed' [39]. Another resident recalls being given a key to the gate by Mrs Elders, but makes no reference to actually having needed to use the key [46].

63. The existence of a gate across the route would not in itself be evidence that use of the way had been interrupted. The evidence of locked gates is contradictory. The only first-hand evidence of a user finding a locked gate is that given by a former pupil [34]. Mr Pearson, the former headmaster of the school in question, does not refer to locked gates along the route.
64. Given that Mrs Elders herself does not refer to the gates actually being locked, but only to them being closed, I consider that it must be doubtful that the gates were locked at times when the general public were likely to be using the path. The user evidence provided by the appellant does not support the fact that the gates were locked during the times that they used the route [7].
65. The school itself was opened in 1973 [7] and the headmaster has stated that the route was used to access the building used for Arts and Music [14]. He does not indicate that the pupils were accompanied on these journeys, and I find it unlikely therefore that they would have all been provided with a key. Neither is it likely that pupils using the route with the full knowledge of the headmaster would have been expected to climb over a locked gate.
66. No dates are given either for the period during which Mr Pearson was headmaster, or for the period during which the annex building was used by the school. It is therefore not possible to say how that affects the likelihood of the gates being locked prior to 1987.
67. However, the fact that the gate was vandalised in 1987, having been present for several years prior to that time, does suggest that there may have been a reason for it to be attacked. Nevertheless, whatever the reason, it does not seem to have prevented access by the witnesses who completed user evidence forms. Some of the user witnesses claim to have used the way on a regular basis (weekly or even more often) and so I conclude that there has been usage of the way for an uninterrupted period of 20 years by at least some members of the public. Notwithstanding that, there is also evidence that usage for other people has been interrupted [33] [34] [47].
68. Consequently I agree with the Council that there is some doubt over whether or not it can be shown that there has been a period of uninterrupted use for 20 years as required by Section 31 of the 1980 Act.

Whether there is sufficient evidence of a lack of intention to dedicate a public footpath during the relevant period

69. In examining this aspect of the evidence, I have had regard to the recent decision in the House of Lords in the case of *Godmanchester and Drain v Secretary of State for Environment Food and Rural Affairs* [2007] UKHL 28 ('*Godmanchester*'). This decision was not available to the Council when coming to its decision.
70. Since a public right of way can only be dedicated by a landowner, it follows that only a landowner is capable of demonstrating a lack of intention to dedicate.

The evidence must therefore be of action taken by or clearly on behalf of the landowner, and not by anyone else.

71. Several residents have stated that there were notices erected along the route indicating that the path was private [39] [44] [45] [48]. There is also documentary evidence that a number of residents of Manor Road enjoy a private right of access on foot over the claimed route [25].
72. The appellant considers that references to 'private' merely relate to the maintenance liability in respect of the path [9] and others in support of the appellant consider that private access rights are superfluous because public rights exist [19].
73. I consider that the wording of many of the notices recalled by the residents (Private; No Thoroughfare etc) [48] are not incompatible with public footpath rights. I agree with the appellant that almost all public footpaths run across private land [9]. It is also a fact that across the country as a whole many public rights of way co-exist with private access drives or tracks. The type of notices referred to may reflect a desire to restrict unauthorised vehicular access. Even a notice saying 'Private right of way' may not preclude the co-existence of a public right of way. Furthermore, there is no evidence that such a notice was erected by the landowner of the land across which the route ran. It was in the adjoining garden of one of the residents of Manor Road [45] and not on land within the curtilage of 'Inglethorpe'.
74. The existence of a documented private right of access [25] does not preclude the fact that a public right of way may also exist, or have been acquired. The documentation of deeds etc. merely provides legal protection for that private right, should it be necessary. Whilst it might indicate that no public right existed when the private right was granted, it does not provide proof of that fact. Neither does it preclude the subsequent dedication of a public right by the owner.
75. The judgement in *Godmanchester* makes it clear that any action taken by an owner to demonstrate a lack of intention to dedicate a public right of way must make that intention clear to the public who use the route. This can be done in a variety of ways, some of which are set out in Section 31 of the 1980 Act, and includes the erection of notices. However, if the notice does not make the intention clear, it is unlikely to provide sufficient evidence.
76. There is evidence that some people who used the way may have considered the claimed route to be private [34] and not to be a public right of way. But there is a significant number of other witnesses who claim otherwise [16] [21] [30]. There are some claims that people were turned back by a previous owner of 'Inglethorpe' [47] [48] but they seem to relate only to children and youths, and may pre-date 1980.
77. The meetings which took place at the solicitors' office [42] [43] suggest that the problem causing greatest concern to the residents was that of antisocial behaviour by children and youths, and not access by the general public. Certainly the owners of 'Inglethorpe' at that time appear not to have been concerned enough to prevent access by the public [43]. Indeed there would

seem to have been an acknowledgement on their part that the public were using the path and might have a right to do so [41].

78. In respect of this criterion the evidence of the actions of the residents and owners in seeking to control or prevent undesirable behaviour by young people appears to have been conflated by the Council with evidence of a lack of intention to deny access to other members of the public. The desire on the part of the residents of Manor Road to be protected from antisocial behaviour is perfectly reasonable, but does not necessarily demonstrate a lack of intention to dedicate a public right of way on the part of the landowner.

79. The erection of gates along the route and the provision of keys to the Manor Road residents does not appear to have resulted in the regular locking of the gates sufficient to have prevented access by the public during the relevant 20-year period. Whilst it may demonstrate that there was no intention on the part of some of the owners of 'Inglethorpe' to dedicate a general public right of way, the lack of rigour rather undermines that assertion; an assertion which is further undermined by the attitude of the Longhorns [43]. Until the erection of the gate in 2000 there does not seem to have been any action taken by any of the landowners of 'Inglethorpe' which sufficiently demonstrated to the public who used the path that there was any intention not to allow their use of it to continue.

80. The evidence relating to the intentions of the owners of the land is therefore contradictory. I do not consider that it is clear enough to be safe to conclude that there was never any intention on the part of all the relevant landowners to dedicate a public right of way. Clearly the Longhorns were aware of the use by the public and were not overly concerned to do anything about it [43]. Their offer to close the path altogether [44] was made after use of the path has been apparently enjoyed by the public with their full knowledge for about 10/12 years⁵. Whilst that period is insufficient for a deemed dedication under Section 31 of the 1980 Act, it is possible that it might be sufficient for a dedication under common law.

Common law

81. The Council considers that there is no evidence of any acquiescence on the part of the landowners and that strenuous efforts were made on their part to prevent access. It is therefore not possible to show dedication of a public right of way at common law [37].

82. I consider that the evidence suggests that the attitude of the Longhorns during their period of ownership [38] [41] was one of tolerance, fully aware of the use by the public and prepared to let it continue rather than to risk a legal challenge [41] [43].

83. Consequently I consider that there is a reasonable allegation that a public right of way could be deemed to have been dedicated during a shorter period than the 20 years required at statute.

⁵ I.e. during their period of ownership

Other matters

Barriers

84. A barrier was erected in 1995/6 by the Council at the expense of the residents [27]. It would seem that the residents considered that the permission of the Council was required as a consequence of a deed relating to the maintenance of foul sewers [27]. The supporters of the appellants consider that the sewer does not follow the line of the claimed route and that the issue is therefore irrelevant [18].

85. I agree that the evidence of the Council's maps suggests that the sewer does not run along the line of the claimed route. It is not clear to me from the evidence submitted why the Council of the time thought that it was necessary to become involved in the erection of the barrier. However, since it was erected at the expense of the residents it does provide evidence that the Council did not consider that the claimed route was publicly maintainable. Nevertheless, the Council is not bound to take on the maintenance of any public right of way which may have been dedicated since the date of its original definitive map and statement and so this factor in itself is not evidence that a public right of way cannot subsist. No details have been provided with regard to the definitive map process within the area for which the Council is now the Surveying Authority so I cannot determine the relevant date.

86. Clearly, those residents of Manor Road who have a private right of access need to be able to use the way on foot. A barrier which prevents access by bicycles or motorbikes would need to permit pedestrian access whether it was by virtue of a private or public right. The evidence with respect to the erection of the barrier is therefore inconclusive as to the question of the nature of access rights.

Public Footpath sign

87. The evidence of the existence of a public footpath sign is contradictory but it has not been categorically denied that one existed [10] [16] [28]. In the absence of more detailed evidence, I cannot place any weight on the issue either way, since the sign is clearly no longer there, even if it once was.

Maps

88. Maps are able only to show the physical existence of a route. They cannot provide evidence of its status, or even its physical construction [11]. I agree with the Council that the Ordnance Survey maps are limited in this regard [24].

Photographs

89. The appellant considers that the photographs taken by the Council are not relevant to the issue [13]. I agree that for the most part they can only present a picture of the current situation. They may depict structures which appear to have been present for some time, but in this case they are not particularly helpful in examining the issues, since the existence of gates has not been questioned [10].

Overall Conclusion

Whether Section 53(3)(b) of the 1981 Act is satisfied

90. There would appear doubt about whether or not it was possible for there to have been enjoyment of the claimed route for the period of 20 years required by Section 31 of the 1980 Act. Furthermore, there is evidence to suggest that action was taken by landowners and residents to prevent access by certain sectors of the public, although it may not have been sufficient to demonstrate a lack of intention to dedicate a public right of way. In view of the conflicting evidence I do not consider that there can be a presumption that the way has been dedicated as a public path under the 1980 Act provisions.
91. With respect to dedication at common law, there appears to be a period of about 12 years (1987/8 to 1999) during which it is possible to consider whether or not the use of the claimed route and the attitude of the landowners has been such that it raises the presumption that the way has been dedicated. However, the evidence does not all point towards such an inference, and thus in my view the more onerous requirements of common law have not been unequivocally satisfied.
92. Consequently I consider it would not be reasonable to make an order on the basis of Section 53(3)(b) of the 1981 Act.

Whether Section 53(3)(c)(i) of the 1981 Act is satisfied

93. There is clearly a conflict of evidence such that **Test A**, as set out in paragraph 51 above, cannot be satisfied and therefore it cannot be shown on the balance of probability that a public footpath subsists along the appeal route.
94. Accepting that there is a conflict of evidence, I must be satisfied firstly that the evidence is credible. There is no evidence that anyone has provided evidence with the intention of misleading anyone or of being dishonest. It seems to me that the evidence submitted by all parties is worthy of belief, and thus is credible even where it may be contradictory. Nevertheless, there is no incontrovertible documentary evidence that a public footpath cannot subsist along the route.
95. I therefore consider that taking all the evidence into account **Test B** is satisfied in respect of the claimed route and that a reasonable allegation has been made that a public right of way subsists over the route in question. An order should therefore be made.

Recommendation

96. I recommend that the appeal should be allowed.

Helen Slade

Inspector

Appendix 1 - Plan 1 - Application to add a Public Footpath between Elwick Road and Manor Road



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