

RIGHTS OF WAY COMMITTEE

11 July 2017

PUBLIC RIGHTS OF WAY

DEFINITIVE MAP MODIFICATION ORDER (No 13) 2014

PUBLIC FOOTPATH No 44 PARISH OF KIRKWHELPINGTON

Report of the Executive Director of Local Services
Cabinet Member: Councillor Glen Sanderson, Environment & Local Services

Purpose of report

To inform the Committee of a decision, by an Inspector appointed by the Secretary of State for the Department of the Environment, Food and Rural Affairs, to determine, following the written representation procedures, the above Order that attracted an objection.

Recommendation

It is recommended that the Committee note the Inspector's decision to confirm the above Order, as made.

1.0 BACKGROUND

- 1.1 Definitive Map Modification Order (No 13) 2014 was made on 18th August 2014 and advertised on 10th October 2014. The Order sought to add to the Definitive Map and Statement a public footpath from the U5008 road at the bottom of Pearson's Bank in a general easterly direction to give access to the Groove Well.
- 1.2 The Order attracted one objection, from the landowner, claiming that any use of the route had been sporadic and with permission, insufficient to raise a presumption of dedication.
- 1.3 At its meeting on 5th May 2015 the Council's Planning & Environment & Rights of Way Committee considered the objection to the Order and resolved to submit the Order to the Secretary of State for determination with a recommendation that the County Council adopt a neutral stance at any future public local inquiry.

Order Decision

Site visit made on 18 January 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 06 March 2017

Order Ref: FPS/P2935/7/52

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Northumberland County Council Definitive Map Modification Order (No 13) 2014 Footpath No 44 (Parish of Kirkwhelpington).
- The Order is dated 18 August 2014 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Northumberland County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Procedural Matters

1. This case concerns the addition of a public footpath along a route commencing on the U5008 road at the bottom of Pearson's Bank (point A on the plan attached to the Order), and running in a generally easterly direction through Well Field to the 'Groove Well' (point B).
2. Northumberland County Council ('the Council') has adopted a neutral stance, and the case in support of the Order is made by Dr Nick Winslow. The objector is the landowner, the Northumberland Estates Limited ('the Estate'). The case is being determined by means of written representations. In addition to the main parties are several 'new' interested parties who have made written submissions. I invited the Estate to comment on these. In their response new evidence was provided and this was circulated for further comment. I have taken into account all of the evidence and comments before me in reaching my decision.

The Main Issues

3. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('the 1981 Act') which requires me to consider whether, on a balance of probabilities, the evidence shows that a footpath subsists along the Order route.
4. The evidence relied on by the Applicant is of claimed use by the public and a presumption of dedication arising under Section 31 of the Highways Act 1980 ('the 1980 Act'). This requires me to establish the date when the public's right to use the Order route was brought into question. The evidence can then be examined to determine whether use by the public has been as of right and

without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowners to dedicate public footpath rights.

5. The evidence may also be considered under common law whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowners, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowners were aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, secrecy or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

Reasons

Presumed dedication under Section 31 of the 1980 Act

When the claimed route was brought into question

6. The application to add the Order route to the Definitive Map and Statement was made in October 2011. This was shortly after Joan Thompson had contacted the Estate regarding the upkeep of the Groove Well and received a response indicating that limited access might be granted. She, like other villagers it is said, was surprised to discover there was no recorded public right of access to the Well.
7. In 1997 the Estate had deposited a statement and plan under Section 31(6) of the 1980 Act showing the routes it accepted as public highways over its land. The Order route was not amongst these. In January 1998 (and again in May 2003 and May 2013) the Estate lodged a statutory declaration indicating that no further public rights of way had been dedicated.
8. The Council therefore took January 1998 as the date of bringing into question. The Estate agrees. Accordingly, I shall consider the 20 year period 1978 to 1998.

Use by the public

9. Eight user evidence forms ('UEFs') accompanied the application of which seven claimed use throughout the 20 year period on foot, between two and four times a year, and one claimed use from 1987, twenty or more times a year. Claimed use was generally to visit the Well, for recreation or going for a walk. One person went there to drink the water and another to tidy the area.
10. Further evidence of use has been provided in the form of letters, emails and the reported recollections of villagers.
11. Bill Short had used the Order route since 1980; whilst Janet Somerville had known of its use by villagers and visitors for some 40 years. Mr and Mrs Fairburn frequently visited the Well, taking friends and family; and Ms D Northcott also walked the route with her partner. Some had been introduced to the Order route and the Well by older villagers.

12. The reported use of others included that by Jean Thompson and her children; Cynthia and John Stevens' frequent visits in their 24 years living in the village; and Kate Wilkinson's regular use from 1997. Joanne Rogerson and Lisa Mulholland often visited the Well in the 1990s; John Rowland, visited it over 38 years often with his children, as had Rob Fairbairn from 1999 (although this is after the 20 year period).
13. The Estate regards claimed use as sporadic in number and frequency and insufficient to raise a presumption of dedication; the additional evidence of use containing insufficient detail from which to establish the frequency of use, and in some cases providing no actual evidence of use, but rather general support for the route being confirmed a right of way. I consider that taken together, the use claimed in the UEFs, although somewhat generalised, is backed up by the letters, emails and reported evidence of use. There is no reason, in my view, to doubt that people other than those completing UEFs have used the Order route, however infrequently.
14. Further support is provided in references made to repair work and maintenance having been carried out for the Parish Council and by village residents, including during the years 1978 to 1998. Amongst those who 'regularly' or 'often' cleared vegetation are Isaac Elliot from the 1960s to c.2008; Jack Young and Ken Hodgson from the 1970s to 1990s. Others said to have kept the Well tidy include Jack Pearson until the mid-1980s, and Sheila Nevin's husband. Again it is not clear how frequently such work was carried out, but it clearly was undertaken and by a number of different individuals over the years.
15. None of the users refer to having sought or been given permission to use the Order route, by the Estate, tenants, or indeed anyone else, although one correspondent, Mr Patrick Keighley describes it as a 'permissive right of way'. No further explanation of this is given. Neither has the Estate provided evidence that permission was granted to individuals to use the Order route during the relevant period.
16. Ian Tait's evidence on behalf of the Estate is that in 2011 he undertook fencing work around the Well and encountered barbed wire on the fence where a wooden stile is situated. He believed this had been in place "for a number of years", and most people would have found it difficult to cross. However, in this case it is contrary to the evidence of users who do not mention any barbed wire during the 20 year period, or indeed at any time. No evidence of its existence is apparent and its position, some lying on the wall as described by Mr Tait in a second statement, appears to be at odds with the location of the fence of which it formed a part and the wall which is some distance away. It is also contrary to the evidence of the former tenant, Norma Edminson, who kept horses in the field. The Estate indicates that some of its tenants request barbed wire and it is not therefore incompatible with the keeping of horses. However, having provided the wooden stile to facilitate access, it seems unlikely that the tenant would have used barbed wire that might make access more difficult, or, as she indicated, with her horses being present in the field. On balance, I do not find that the Order route was obstructed during the 20 year period such that use was with force as claimed by the Estate. The installation of a gate in fencing erected around the Well in 2011 took place after the period under consideration.

17. I conclude that use by the public has been as of right, without force, secrecy or permission, and taken as a whole is sufficient to raise a presumption of dedication.

The evidence of the landowners

18. I do not attach weight to satellite images showing the land crossed by the Order route and which the Estate claims show no wear line corresponding with it: the images date to 2002, 2006 and 2009, later than the 20 year period under consideration.
19. The Estate remarks that its current tenant, who has occupied the land since 2005, has no knowledge of its use with the exception of the odd occasion when permission has been given for research or meetings about the history of the Well. No further details of such permissions are given. In any event though, I do not attach weight to this as it relates to a period after 1998.
20. Furthermore, the evidence of the previous tenants, Norma and Peter Edminson, who occupied the land between 1990 and 2004, is that they built the wooden stile (paragraph 16), in a fence they erected in around 1992 for stock control purposes, to maintain access to the Well. I consider it significant that the stile (which is in line with the stone stile) was provided as this indicates the tenants acknowledged people were accessing the Well. Had this not been the case, there would have been no need for them to have provided access over the fence. There is no indication that it was provided to facilitate their personal use. In the absence of evidence to the contrary, it may be assumed that the tenants were acting in the interest of the landowner.
21. Similarly, I do not attach weight to the route being overgrown in 2011 as evidence that it was not in use by the public, as this postdates the 20 year period under consideration. I acknowledge, however, that parts of the Order route were subject to overgrowth during the 20 year period as evidenced above by those individuals who cleared and maintained the path and Well (paragraph 14).
22. There is no evidence of any challenges made by (or on behalf of) the landowner to the public's use of the Order route, or of any signs or notices indicating that there was no public right of way during the 20 year period, or at any time.
23. I agree that statutory declarations submitted by the Estate subsequent to the statement and plan deposited under Section 31(6) of the 1980 Act, are sufficient evidence to show that the landowner had no intention to dedicate a public right of way over the Order route at those dates. Accordingly, a public right of way could not arise after the end of the 20 year period under consideration and the date of the application.

Conclusions on presumed dedication

24. I find that there has been use of the Order route throughout the 20 year period. Although such evidence provided with the application was relatively slight in frequency, I consider it is bolstered by the additional evidence of use described in the written submissions. This is further supported by the regular maintenance of the Order route carried out by local individuals, a further indication that a right was being asserted: there is no evidence that permission was sought to undertake such work. Furthermore, the tenants' maintained

access to the Well following the installation of a new fence and stile, thus acknowledging that use took place. Further, there is nothing in the evidence adduced by the landowner to demonstrate that during this 20 year period they had no intention to dedicate the Order route as a public right of way. It follows that the Order should be confirmed.

25. Although I have concluded that a presumption of dedication arises under Section 31 of the 1980 Act and this has not been rebutted by the actions of the landowners, such that a right of way subsists over the Order route, for completeness I shall also consider the evidence at common law.

Common law

Documentary evidence

26. I am not convinced that the Order route is shown on the earliest of the Ordnance Survey ('OS') maps that have been provided, dating to 1866. It clearly shows a feature represented by parallel pecked lines between a building (no longer there) and the Well. However, no continuous feature following the Order route between points A and B on the Order map is shown, although such a route is apparent on the 1924 and 1951 OS map editions. I am satisfied that it is the same route shown in the Order plan and claimed to have been used by the public. However, since the 1880s, OS maps have carried a disclaimer that the representation on them of a track or path is not evidence of the existence of a public right of way. Accordingly, these maps provide good evidence that at the time of the survey a path consistent with the Order route physically existed, but its status cannot be determined.
27. The path is said to be shown on earlier maps such as the 1851 Bell collection and 1844 Tithe Map, although the Well is not marked. Copies of these maps have not been provided.
28. A map dated 31 March 1924 prepared on behalf of Bellingham Rural District Council in relation to a proposed new road and closing of an old road does not show the Order route, although other footpaths in the village are depicted. However, contemporary OS mapping shows the route did exist at this time.
29. Save for a newspaper reference (paragraph 31), there are no historical commentaries on the Well. For example, it is not mentioned in the Reverend Hodgson's 1827 History of Northumberland, although he lived in the village. I note that despite the Parish Council being in contact with the Council during part of the relevant period, the omission of the Order route from the Definitive Map was not raised. There is no mention of the path or the Well in an article written between October 1990 and April 1995 describing a walk around Kirkwhelpington, despite the route following the U5008 road. Neither does a walks leaflet produced in 2000 refer to the Order route or Well, although it did not include the part of the village where it is situated. Nor does it feature prominently in Kirkwhelpington's Conservation Area Character Appraisal, adopted in 2009. An application for listed building status for the Well was unsuccessful. However, this has no bearing on the existence or otherwise of a public right of way to it.

Evidence of use

30. Unlike other wells in the village or local area, of which there are several, the Groove Well is a sulphur well with reputed medicinal qualities, referred to by

some as a "spa". The water falls into a stone lined tank set in the ground, accessed via a flight of stone steps, and apparently is the only well in the village to have been "improved" in this way.

31. An article in the North Mail newspaper of August 1911 refers to "Kirkwhelpington Water". Although the source is not named or its location described, it seems to me more likely than not that the article refers to the Groove Well. The (anonymous) author's description is of "healing water" that he and others had come to drink, that could "now be drawn with ease from the spring". He also refers to men having gone from the (former) Temperance Hotel¹ to carry out works to enable the water to flow freely. This is consistent with the current appearance and stated attributes of the Well. The article does not state whether those taking the waters went to the Well themselves, or whether the waters were brought to them at the Hotel. Nevertheless, I consider it provides support for the Well's notoriety at the time.
32. It was not until 1952 that a mains water supply was provided to the village. In my view, this increases the likelihood that the Groove Well would have been used by some members of the public as a source of water. Several villagers and their visitors are said to have used the Well's water on a regular basis for brewing tea, including Mrs Constance Corbett (since 1970) and Mrs Nora Moffit who collected it daily; or drawing a bottle or two to take away, including Jack Pearson's daughter-in-law, and Sid Sleight. Mrs Lydia Barton continued to collect water from the Well after mains water had become available. Access to the Well is facilitated by way of the Order route.
33. However, there is much evidence of use for recreational purposes dating from the 1930s, both in writing and reported, in addition to that considered above. Several people recall visiting the Well as school children, during lunchtimes, or on nature walks including Jean Senior, Jenny Foley, Eileen Murray, Ronnie Charlton, Tommy Marsh, Allan Kennedy and Michael Kell. Philip Senior had used the Order route to visit the Well for over 50 years. Philip Moffit recalls when the school closed his father and Allan Kennedy going to the well to fill the jug of water on display for people to taste. Mr Hofmann had used the Order route with his family since 1972.
34. It follows that I do not share the Estate's view that the Well was visited irregularly, and consider that the use described suggests that whilst use may not have been on a daily basis it was regular and consistent over many years, and as of right.
35. At point A and again at the boundary of the field in which the Well is situated are stone walls into which are built stone step stiles. These together with the wooden stile provide access directly to the Well. The stone stiles appear to form part of the original walls, although it cannot be said categorically whether their original purpose was for public or private access. The one at A is situated adjacent to a field gate but the second is some distance from another gate. The Estate considers the stiles were for private access, but there is nothing to indicate this was the case. The wooden stile, a much later feature, was provided to maintain access (paragraphs 16 and 20).
36. Although the Estate considers the Order route has not been maintained, the evidence provided by the applicant and other villagers is that there has been

¹ Situated near to the Church up the hill from the Order route

regular and consistent maintenance of the Order route (and also of the Well itself) over the years. Some of this for and on behalf of the Parish Council.

37. Having regard to the evidence as a whole, I consider on balance that a case is also made out at common law prior to 1998, there having been longstanding use of the Order route by the public and acquiescence in that use by the landowner.

Conclusions

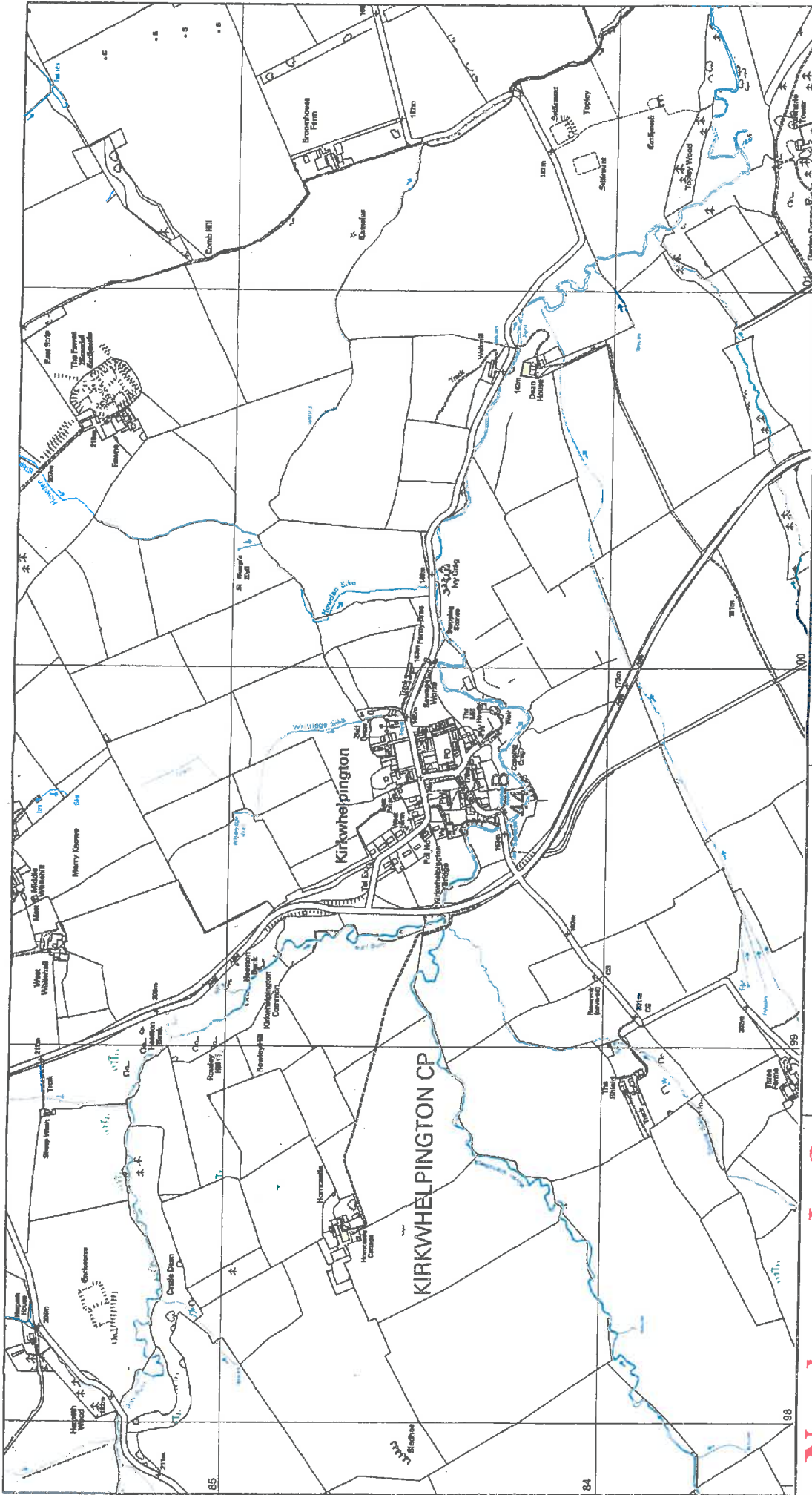
38. Having regard to these and all other matters raised in written representations, I conclude that the Order should be confirmed.

Formal Decision

39. I confirm the Order.

S Doran

Inspector



Northumberland

Northumberland County Council

Sustainable Transport
Local Services

County Hall, Morpeth, Northumberland
Telephone 0845 500 6400 NEE51 2EF

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Wildlife and Countryside Act, 1981

**Definitive Map of Way
Public Rights of Way
for the
County of Northumberland**

**The Northumberland
County Council**

**Modification Order
(No. 13) 2014**

- Public Footpath to be deleted
- Public Footpath
- Public Bridleway
- Restricted Byway
- Byway Open to All Traffic

O.S. Map NY 98 SE

Scale: 1/10,000

Former District(s) Alnwick

Definitive Map No 153

Permitted(s) Kirkwhelpington

Date: June 2014

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