

Hertfordshire County Council

Statement of Grounds/Case



Hertfordshire County Council

(Berkhamsted Footpath) Creation Order 2017

and

Hertfordshire County Council (Berkhamsted 27)

Extinguishment Order 2017

1.0 BACKGROUND INFORMATION

1.1 Berkhamsted Footpath 27 (Footpath 27) runs from Lower Kings Road in a generally westerly direction to St Johns Well Lane, in Berkhamsted town, as shown in the extract from the current Definitive Map (2015) (**HCC 01**).

1.2 Footpath 27 has documented anomalies:

- The existing footpath recorded on the current Definitive Map runs, in part, within the curtilage of flats at Kings Court, in the River Bulbourne and through the walled garden of no.4 St Johns Well Lane (point H on the Extinguishment Order Plan).
- The Definitive Statement (**HCC 02**) describes the existing footpath as running "... into St Johns Well Lane between two pairs of cottages" which affects St Johns Well Lane car park and nos. 2 and 3 St Johns Well Lane.
- The First Definitive Map (**HCC 03**) showed the footpath running to a junction with St Johns Well Lane which affects St Johns Well Lane car park and no. 1 St Johns Well Lane.
- Footpath 27 is now also obstructed by the River bridge at point D on the Creation Order Plan. For these reasons Footpath 27 cannot physically be used.

1.3 In 1993 evidence was submitted to HCC in support of a public right of way on two joined routes in Berkhamsted, one running between Lower Kings Road, St Johns Well Lane and the High Street, part of which was on a similar route to

the existing route of Footpath 27 [running approximately between points A and B on the Creation Order Plan and continuing north west (through the car parks) to the entrance to St Johns Well Lane car park (point J on the Extinguishment Order Plan) and with the second adjoining route running south west to the High Street across land on which is now the Waitrose store].

1.4 HCC had also received, in July 2010 and again in September 2012, a request from an affected landowner to resolve the anomalies on Footpath 27. The proposal to make concurrent creation and extinguishment orders was made by HCC. The Orders, if confirmed, will remove the existing unusable route of Footpath 27 and create a new footpath on a built, usable route running on a similar line between Lower Kings Road and St Johns Well Lane and shown between points A and F on the Creation Order Plan.

1.5 The existing and proposed new footpaths run over land owned mainly by Dacorum Borough Council, however sections of the land crossed by the existing and proposed new footpaths are in other ownership and a section of the land between the River and the Canal (approximately between points E and F on the Creation Order Plan) is unregistered. Hertfordshire County Council (“HCC”) has consulted all known owners.

1.6 In October 2012, HCC consulted affected landowners and the relevant local authorities on a proposal to address the 1993 evidence and the anomalies in the Definitive Map and Statement (DM&S) by making either a modification order or public path orders in relation to Footpath 27. Six responses were

received, five of which generally supported HCC pursuing concurrent public path orders to resolve the anomalies on Footpath 27. One response appears to favour one of the routes shown in the 1993 evidence but the reasons for this were not clear.

- 1.7 In October 2013, HCC consulted on an investigation of the 1993 evidence relating to the two joined routes. HCC made it clear that it had to make a decision on the submitted (or 'discovered') evidence in the manner prescribed by section 53 Wildlife and Countryside Act 1981. In November 2013, HCC decided not to make a modification order. However, the investigation of all the evidence relating to these two joined routes did set out the anomalies in the way Footpath 27 has been recorded since the early stages of the Definitive Map.
- 1.8 Following its decision not to make a modification order, HCC has undertaken further consultation, including statutory organisations, local user group representatives and interested persons, between 2013 and 2015, regarding proposed public path orders affecting Footpath 27.
- 1.9 Following receipt of the decision not to make a modification order in November 2013, eight responses were received. As before, the responses were generally in favour of re-routing footpath 27 but the Canal & River Trust confirmed that it would not agree to the Footpath running along the Canal towpath and Berkhamsted Town Council questioned whether there would be sufficient width for a footpath around the buildings at 36a and b, Lower Kings Road. One of the

landowners continued to express reservations about altering the legal record of Footpath 27. HCC has endeavoured to address those concerns.

1.10 In December 2015 HCC consulted with draft creation and extinguishment orders, addressing specific points which had been raised in earlier consultation – i.e. the width of the proposed new footpath and the potential for future development of the Waitrose site. Two responses were received from the objectors to the Orders including various issues, which are discussed further in section 6 below (comments on the objections).

1.11 The Hertfordshire County Council (Berkhamsted Footpath) Creation Order 2017 and the Hertfordshire County Council (Berkhamsted 27) Extinguishment Order 2017 ('the Orders') (**HCC 04 and 05**) were made under the Highways Act 1980 ('HA 1980') sections 26 and 118 respectively (**HCC 06 and 07**). The Orders were sealed on 11th August 2017 and the Notice advertising the making of the Order was published in accordance with Schedule 6 HA 1980 on 6th September 2017.

1.12 Three objections to the Orders were received, one of which has been withdrawn.

1.13 Since making the Orders, HCC noticed a typo in part 1 of the schedule to the Creation Order. The grid reference for point D is given as "TL 9893 0807" and it should be "SP 9893 0807" in keeping with the rest of the stated grid references.

If the Inspector is minded to confirm the Orders, HCC requests that the prefix of the grid reference for point D is amended to “SP”.

2.0 Description of the Order Routes

- 2.1 The Order routes affect land in the parish of Berkhamsted, which lies between Hemel Hempstead and Tring, north of the A41 in west Hertfordshire. The land is in Berkhamsted town centre running very close to, and crossing, the River Bulbourne.
- 2.2 The Creation Order will create a public footpath commencing from Lower Kings Road running north west along an access road for 95 metres and around the outside of 36a Lower Kings Road, continuing north for 20 metres outside the western boundary of 36a & b Lower Kings Road, then west for 145 metres on the south side of the River Bulbourne, across the bridge over the river, then north and north west for 140 metres across the grass between the river and the canal towpath to join Footpath 30 to the north of no. 4 St Johns Well Lane.
- 2.3 The width of the proposed new footpath is recorded as varying between 1.6 metres and 4 metres between points A and F on the Creation Order Plan. The existing Definitive Statement for Footpath 27 does not record a width. The width of the proposed new footpath is discussed in paragraph 6.10 (comments on the objections). The Creation Order does not record any limitations on the proposed new footpath.

2.4 The Extinguishment Order will stop up all of Footpath 27. This includes the footpath as currently recorded on the Definitive Map between Lower Kings Road and St Johns Well Lane and, for completeness, will also stop up the route which is described in the Definitive Statement and the route which was shown on the First Definitive Map.

3.0 **Statutory Provisions**

3.1 The Orders were made under sections 26(1) and 118(1) HA 1980 and the reasons for making them are given in paragraphs 4.1- 4.5 below.

3.2 The tests for confirmation of the Orders are set out in sections 26(3)(A) and in section 118(2),(5),(6),(6A) HA and the reasons HCC considers these are met are set out in paragraphs 5.1 – 5.8 below.

4.0 **Reasons for Making the Orders**

4.1 Section 26(1) HA1980 provides:

“Where it appears to a local authority that there is a need for a footpath... over land in their area and they are satisfied having regard to -

(a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and

(b) the effect which the creation of the path or way would have on the rights of persons interested in the land, account being taken of the provisions as to compensation contained in section 28,

it is expedient that the path or way should be created...”

4.2 HCC considers that the proposed new footpath fulfils the requirements of section 26(1)(a) HA 1980 as it will add to the convenience and enjoyment of the public and local residents, by recording a properly defined footpath of a similar length to the existing route of Footpath 27. In addition the proposed new footpath is physically separated from vehicular traffic between points B and F on the Creation Order Plan, and therefore provides a safer and more convenient access to the car parks, the river, the canal towpath and St Johns Well Lane. There are recreational facilities on the north side of the canal (“Canal Fields”) which can be accessed via the canal bridge, which is just to the north east of point E on the Creation Order Plan. The proposed new footpath is currently available for public use and follows a generally similar route to the existing route of Footpath 27. The Creation Order also provides an additional benefit of clarity to the DMS.

4.3 HCC considers that the proposed new footpath fulfils the requirements of section 26(1)(b) HA 1980 as the landowners and occupiers, other than the objectors, are in favour of (or have no objection to) the Creation Order, which regularises the situation on the ground. The two objections have been received from affected owners whose properties have a private right of way along an occupation road (part of which is the access road between points A and B on the Creation Order Plan). The objectors may claim compensation if the Creation Order is confirmed. However, the objectors own only a small section of the land crossed by the proposed new footpath which is already in regular use by the public.

4.4 Section 118(1) HA 1980 provides:

“Where it appears to a council as respects a footpath in their area...that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them...extinguish the public right of way over the path or way”.

4.5 HCC considers that, when considered concurrently with the Creation Order, the existing footpath is not needed for public use both because it cannot physically be used and because the Creation Order provides a suitable alternative footpath. The Access Officer is not aware of any complaints relating to the existing definitive footpath, though there have been requests for the Access Officer to manage the proposed new route. HCC therefore considers that it is expedient that the existing footpath be stopped up.

5.0 **Reasons for Confirming the Orders**

5.1 Section 26(3)(A) HA 1980 provides that:

“The considerations to which the Secretary of State is to have regard in determining whether or not to confirm... a public path order... include any material provision of rights of way improvement plan...”

5.2 HCC considers that it is expedient to confirm the Creation Order as the proposed new footpath will contribute positively to the following core actions of the Rights of Way Improvement Plan (“RoWIP”) (**HCC 08**):

- 1) Develop routes that cater for the needs of people with limited mobility and visual impairment.

3) Reduce the number of physical barriers on the network, e.g; improve surfacing, remove or improve structures.

6) Create off-road routes linking communities with places of work, schools and other local facilities.

In addition to this, as a result of public consultation on the Creation Order a provision has since been added to the ROWIP for additional width on the proposed new footpath, between points B and D on the Creation Order Plan, if there is an opportunity in the future.

5.3 Section 118(2) provides that:

“The Secretary of State shall not confirm a public path extinguishment order...unless he...is satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him...that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 (of HA)”.

5.4 HCC considers that it is expedient to confirm the Extinguishment Order because it satisfies the tests of section 118 when considered concurrently with the Creation Order. The existing footpath is not used, so this will not be changed by the confirmation of the Extinguishment Order. For the purposes of section 118(6) HA 1980, the reasons why the existing footpath is not used (given at paragraph 1.2 above) may be considered to be temporary circumstances preventing or diminishing the use of the path or way which

should be disregarded. However section 118(5)(a) HA 1980 does allow the Creation Order to be taken into account when deciding whether the existing footpath is needed for public use. HCC considers that if the Creation Order is confirmed this will mean that the existing route of Footpath 27 will not be needed for public use, regardless of any temporary circumstances affecting the existing footpath.

5.5 HCC considers that extinguishing the existing footpath will have a positive effect on the land by removing the DMS anomalies which affect the block of flats at Kings Court off Lower Kings Road, the River Bulbourne, the St Johns Well Lane car park and the cottages on St Johns Well Lane. No compensation is anticipated as a result of the extinguishment.

5.6 Under s.118 (6A) HA 1980 consideration must be given to:

“any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way.”

5.7 HCC’s RoWIP does not affect any of the land over which the Extinguishment Order would extinguish a public right of way.

5.8 HCC considers that if the Creation Order and Extinguishment Order are confirmed, there will be a better alternative public footpath along a more suitable route which the public already use. HCC would not wish to confirm the

Extinguishment Order unless the Creation Order is also confirmed and would ask that the Inspector considers these two orders concurrently.

6.0 **Objections**

6.1 There remain two outstanding objections to the Orders from Dr & Mrs Goodliffe and Mr Matthew Goodliffe. These objections (and associated correspondence) are contained in **HCC 09**.

6.2 Dr & Mrs Goodliffe did not include in their letter of 11th September 2017 (**HCC 09b**) detailed grounds of their objection. However, Mrs Goodliffe confirmed the grounds of their objection in an email dated 3rd August 2018 (**HCC 09c**). The grounds are more particularly described in earlier correspondence (**HCC 09d – f**). HCC addresses below the points which were raised within that correspondence.

6.3 The key reasons for the objections are:

- Maintenance and width
- Public safety and alternative routes
- Future planning applications
- Private right of access between Lower Kings Road and St Johns Well Lane
- History of the Definitive Map
- Possibility of user based application for a modification order

Maintenance and width

- 6.4 Matthew Goodliffe considers that as he has been maintaining the access road to his property (36A Lower Kings Road) for over 16 years and that it is unfair that HCC would take over management of the route if the Creation Order is confirmed. He is also concerned about what his 'duty of care' would be, as a landowner, towards the public if the Creation Order is confirmed and whether he would be involved in maintenance dialogue and decisions. Mr Goodliffe would not want HCC to remove the boundary hedge and tree (points B to C on the Creation Order Plan) in order to create the stated width on the proposed new footpath.
- 6.5 HCC considers that the Creation Order, if confirmed, will record the proposed new footpath as a public highway of footpath status. Normal surface maintenance, to footpath status, would become HCC's responsibility as Highway Authority. A recorded right of way does not alter ownership of the land it crosses but HCC would adopt the maintenance and repair responsibilities of the surface of the land over which the route of the footpath will run, to footpath standards only.
- 6.6 Currently the owners are liable, under occupier's liability, for the land crossed by the proposed new footpath - which is already open and available for public use. If the proposed new footpath is recorded on the Definitive Map then occupier's liability would be reduced as the liability would be shared with HCC as Highway Authority. It would be HCC's responsibility to keep the surface in a safe & suitable condition for pedestrian use.

- 6.7 Where use is shared by vehicles (such as between points A and B on the Creation Order Plan) HCC is usually approached by landowners wishing to maintain the surface of a RoW, rather than the other way around. This is because vehicular use will generally require a higher standard of maintenance than pedestrian use. HCC would maintain the land crossed by the proposed new footpath to the standard of a public footpath only. Any damage to the surface caused by private access rights would remain the responsibility of the landowner/s and those with private rights.
- 6.8 There is no formal application process or cost for a landowner to approach HCC about upgrading or maintaining the surface of the highway although this must only be done with the consent of HCC. HCC acknowledges that this is a process that Mr Goodliffe has not so far had to follow but it is not a formal or onerous process. A request from a landowner will be forwarded to the Access Officer who will advise accordingly – permission to undertake maintenance will not be unreasonably withheld.
- 6.9 The occasional exception to this is when HCC receives complaints from the public about the condition of the surface of a right of way. In these circumstances, HCC contacts the owners in order to agree the necessary works and the percentage split of the costs, i.e. highway interests are measured against private interests.

6.10 HCC acknowledges that the proposed new footpath narrows between points B and C on the Creation Order Plan, but it does not intend to remove the hedge and tree on the western boundary of 36A and B Lower Kings Road. Trimming the growth on the outer (west) side of the hedge would enable HCC to increase the width to that recorded in the Creation Order. As a result of the public consultation and in order to address the narrower width, HCC has noted in the RoWIP the desire for additional width on the proposed new footpath, between points B and D on the Creation Order Plan, which will be followed-up should an opportunity to improve the footpath become available.

Public safety and alternative routes

6.11 Matthew Goodliffe and Mrs Goodliffe have expressed concerns for the shared use of the proposed new footpath, between points A and B on the Creation Order Plan (which includes a dog leg), in that pedestrians and vehicle users may not be aware of the presence of each other as visibility is limited. They both feel that a route along the towpath or through the adjacent car parks would be safer or more logical in order to reach the High Street, Waitrose store or the Canal. On the south side of the Waitrose store, running generally parallel to the High Street there is a marked pedestrian route within the car park (though it is not physically separated from parking bays).

6.12 HCC considers that the proposed new footpath benefits from being physically separated from the car parks/vehicular traffic between points B and F on the Creation Order Plan and safely provides convenient access to the car parks, the river, the canal towpath and St Johns Well Lane. There are also

recreational facilities on the north side of the Canal (“Canal Fields”) which can be accessed via the canal bridge, which is just to the north east of point E on the Creation Order Plan.

6.13 The access road between points A and B on the Creation Order Plan is used by vehicles but access is limited to a small number of properties and businesses. The proposed new footpath is already open and available for public use and HCC has not been made aware of any actual conflict between pedestrians and vehicles. Confirmation of the Creation Order is unlikely to change day to day use of the access road. HCC has noted the route's popularity from; site visits, positive responses to the public consultation (i.e. no objections to the Orders from user groups) and requests to the Access Officer for the proposed new footpath to be maintained at public expense.

6.14 During the public consultation, HCC approached the Canal & River Trust to ask whether it would agree to a footpath being wholly created along the towpath between Footpath 30 (for St Johns Well Lane) and Lower Kings Road. The Trust responded to say that, for operational reasons, it would not agree to a footpath crossing the land. Equally, HCC has support (or no objection) from the owners and occupiers crossed by the majority of the proposed new footpath.

6.15 HCC considers that, as a private access road (currently a dead-end), vehicular movements between points A and B on the Creation Order Plan will be considerably fewer than those within the busy car parks and to the rear of properties on the High Street - on the south side of the Waitrose store.

6.16 With regards to the alternative routes suggested by Mr Goodliffe and Mrs Goodliffe, HCC considers that the Creation Order must be determined in respect of the proposed new route and whether it meets the tests under section 26 Highways Act 1980.

Future planning applications

6.17 Matthew Goodliffe and Mrs Goodliffe have both referred to the impact that a recorded right of way, crossing and adjacent to their property, may have on any future planning applications in relation to 36A & B Lower Kings Road.

6.18 HCC considers that public access would be taken into consideration, within the planning process, by the planning authority. With regards to the proposed new footpath there is already established pedestrian access over and passing Mr and Mrs Goodliffe's land (point A to C on the Creation Order Plan), which HCC would want to be accommodated within the planning process if a planning application were made. HCC regularly acknowledges developers concerns where there is a recorded right of way across a site. The existence of a right of way does not preclude development as the Town & Country Planning Act 1990 allows for rights of way to be stopped up or diverted if it is necessary in order to enable development to be carried out.

Private right of access between Lower Kings Road and St Johns Well Lane

6.19 Dr & Mrs Goodliffe and Matthew Goodliffe have raised two concerns: 1) that the proposed new footpath, in part, follows their private occupation road between

approximately points A and B on the Creation Order Plan, which is described in their title documents as continuing to St Johns Well Lane; 2) that this occupation road has not been maintained and has been allowed to become obstructed by the Waitrose car park. Matthew Goodliffe has asked HCC to discuss with Dacorum Borough Council (owner of the land crossed by the Waitrose car park and occupation road) the obstruction of the occupation road.

6.20 Whilst HCC does not consider that the private right of way relates to the tests for confirmation of the Creation and Extinguishment Orders, it acknowledges that a private right of way is reserved within the titles for 36A (HD295446) and 36B Lower Kings Road (HD206807) and the section of the access road way owned by Dr & Mrs Goodliffe (HD277798). HCC was not party to the conveyances which provide the private right of way and it does not own any of the land in this area. However HCC contacted Dacorum Borough Council in November 2017 and in July 2018, after receiving Mr Goodliffe's letter of objection, reiterating the concerns raised with regard to the private occupation road and asking for an explanation of how the occupation road to St Johns Well Lane was removed.

History of the Definitive Map

6.21 Matthew Goodliffe and Mrs Goodliffe consider that HCC's view of the anomalies in the way footpath 27 has been recorded (including incorrect mapping and signs) should not be 'absolved' by extinguishing the existing footpath and that it is 'unjust' to create the proposed new footpath across and adjacent to their properties. Mrs Goodliffe also considers that the Definitive

Map shows that the block of flats at Kings Court (off Lower Kings Road) obstructs the existing footpath and council approval would have been required in order to do this. Matthew Goodliffe and Mrs Goodliffe consider that the problem is of HCC's own making and do not wish the 'status quo' to change.

6.22 HCC has documented anomalies, relating to the way in which Footpath 27 has been recorded, since the First Definitive Map, as described at paragraph 1.2 and 5.4 above. HCC considers that these anomalies are largely due to drafting errors since the time of the First Definitive Map. HCC has also been requested, by a different affected landowner, to resolve these anomalies (see paragraph 1.4).

6.23 HCC has not considered in detail whether the existing footpath is obstructed by the block of flats at Kings Court because HCC considers that all problems on the existing footpath will be removed by confirmation of the Orders. However HCC accepts that, taken at face value, the Definitive Map shows the existing footpath obstructed by the south west corner of the building (**see HCC 01**).

6.24 The Definitive Map shows the precise location of recorded rights of way but the line style used to depict definitive routes is sufficiently thick to enable people to see the routes clearly on the Definitive Map. The thickness of the line used represents a width of 8 metres on the 1:10,000 scale on the Definitive Map. This means that the existing footpath may include land up to 4 metres on either side of the centre line. In this instance, the centre line of the existing footpath

runs around the south west boundary of the block of flats, rather than through the building.

6.25 HCC does not hold any relevant records concerning the planning application for the block of flats (built c.1990s – between Definitive Maps 1991 and 2000) in relation to the existing footpath. It is possible that HCC would not have been consulted by the planning authority if there was no footpath in evidence on the ground but this has no effect on its status as Footpath 27.

6.25 HCC's intention is to use its powers under HA 1980 to remove the existing, confusing, record of Footpath 27 and clearly record a usable footpath for the benefit of the public. HCC considers that will be achieved by the concurrent Creation and Extinguishment Orders because the proposed new footpath is already well known and well used by the public.

Possibility of an application for a modification order

6.26 Matthew Goodliffe and Mrs Goodliffe are both concerned that there is a possibility that the proposed new footpath across and adjacent to their property could be an existing, unrecorded, public right of way.

6.27 HCC is aware that the part of the proposed new footpath which affects Mr and Mrs Goodliffe's land, between points A and C on the Creation Order Plan has been available for public use for some time. There are two existing signposts, both at point A on the Creation Order Plan, both indicating a footpath and pedestrian access to the River Bulbourne, the canal and St Johns Well Lane.

HCC considered that it was better to bring to the attention of Dr & Mrs Goodliffe and Mr Goodliffe the possibility of unrecorded public rights, across their land, as part of the discussion relating to the concurrent orders.

6.28 However, no application has been received by HCC to modify the Definitive Map in respect of the route between point A and C on the Creation Order Plan and this issue was not raised by the public during the consultation. HCC considers that the concurrent orders will adequately address the need for recorded pedestrian access between Lower Kings Road and St Johns Well Lane.

7.0 Conclusion

7.1 HCC considers that, whilst validly made objections have been received, the Orders meet all the tests under sections 26 and 118 HA 1980 for the reasons given above and should be confirmed.

7.2 HCC respectfully requests that the Orders are confirmed subject only to the amendment requested at paragraph 1.13 above.

LIST OF SUPPORTING DOCUMENTS (See appendix)

HCC no.	Document description	Appendix page no.
01	Extract taken from the 2015 Definitive Map	1
02	Definitive Statement for Berkhamsted 27	2
03	Extract taken from the First Definitive Map	3
04	Hertfordshire County Council (Berkhamsted Footpath) Creation Order 2017	4 – 7
05	Hertfordshire County Council (Berkhamsted 27) Extinguishment Order 2017	8 – 9
06	Section 26, Highways Act 1980	10 – 13
07	Section 118, Highways Act 1980	14 – 17
08	HCC's Rights of Way Improvement Plan – Core Values	18 – 19
09	Objections and correspondence:	
a	Matthew Goodliffe 03 10 2017	20 – 27
b	Dr & Mrs Goodliffe 11 09 2017	28
c	Mrs Goodliffe 03 08 2018	29 – 30
d	Goodliffe family 23 11 2012	31 – 32
e	Mrs Goodliffe 13 01 2016	33 – 34
f	Mrs Goodliffe 12 02 2016	35 - 37