



**Hertfordshire County Council  
(Knebworth 21 and 44 and Stevenage 108)  
Modification Order 2011**

**HCC's Statement of Case**

Hertfordshire County Council  
County Hall  
Pegs Lane  
Hertford  
SG13 8DN

1. Hertfordshire County Council (“HCC”) has sent the above modification order to the Planning Inspectorate with a request that it is not confirmed because the Order Route has been extinguished and an alternative path created that is more convenient to the landowners and public.

## **BACKGROUND INFORMATION**

2. On 6<sup>th</sup> January 2005 Mark Westley of the East Herts Footpath Society submitted an application (**HCC 01**) to HCC under section 53(5) of the Wildlife and Countryside Act 1981 (“WCA”) to modify the Definitive Map and Statement for Hertfordshire (“DMS”) by adding two routes through Knebworth Estate near Stevenage. The first of these was a public footpath across the Park, from the cricket ground on Old Knebworth Lane in a generally northerly direction to join the roundabout at junction 7 of the A1(M) motorway. The second was a byway open to all traffic (“BOAT”) along the line of an old road on the west side of the A1(M).
3. In 2007 HCC started an investigation into all the available evidence relating to the routes and consulted all known landowners, Stevenage Borough Council, North Herts District Council, Knebworth Parish Council, the HCC councillor and the applicant. HCC also consulted with all interested user groups, and they, along with all other consultees, were requested to submit any evidence that they were aware of relating to the application routes.
4. A decision was made in September 2011. HCC considered all the evidence set out in the investigation report prepared by the definitive map officer, together with the evidence received during the consultation period, in conjunction with the relevant legislation and case law. HCC decided that in consequence of the occurrence of the events specified in section 53(3)(c)(i) of the WCA, an order should be made to record a public footpath as set out in the application. HCC also decided that the evidence did not show that a BOAT existed and so it rejected that part of the application. The applicant made a Schedule 14 appeal to the Secretary of State but this too was rejected in 2012. This Statement of Case does not therefore address the BOAT part of the application further.

The Hertfordshire County Council (Knebworth 44 and Stevenage 108) Modification Order 2011 (“the Modification Order”) (**HCC 02**) was sealed on 6<sup>th</sup> October 2011 and advertised in accordance with Schedule 15 of the Wildlife and Countryside Act 1981 on 20<sup>th</sup> October 2011. Three objections and two representations (**HCC 03-07**) to the Order were received. None have been withdrawn.

## **DESCRIPTION OF ROUTE**

5. The Order Route begins by Church Lodge on Old Knebworth Lane at point A on the Modification Order Plan. It heads in a generally north easterly direction across the cricket ground and over the tarmac driveway that is the visitor entrance to Knebworth House. It then continues in the same direction across the parkland to the children’s play area, known as Fort Knebworth. It passes through this and then crosses the visitor exit from Knebworth House (once recorded as Knebworth Footpath 21 – see **HCC 14 and 15**) at point B on the Modification Order Plan. At point C it crosses the parish boundary and turns north west, running parallel to the parish boundary to the boundary with the Novotel, the hotel on the motorway roundabout, at point D on the Modification Order Plan. At that point it once again heads north east, through the hotel grounds to the roundabout at junction 7 of the A1(M) motorway at point E on the Modification Order Plan.

## **STATUTORY PROVISIONS**

6. The Order was made under section 53(2)(b) of the WCA (**HCC 08**) on the basis of “events” as set out in subsections 53(3)(c)(i) of the WCA, namely, the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:
  - (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic.

## **THE LEGAL POSITION REGARDING ROUTES NOT YET RECORDED ON THE DMS**

7. The Modification Order has been made but has not been confirmed, meaning that the Order Route was not recorded on the DMS at the time that it was

extinguished (see paragraph 18 onwards). However, paragraph 5.22 of Defra's Circular 1/09 (**HCC 9**) confirms that it is possible to do this:

*"Section 118 of the 1980 Act enables authorities to make orders extinguishing footpaths, bridleways and restricted byways. Ways need not be shown on the definitive map and statement before they can be extinguished but authorities must be satisfied as to the status of ways before making an order and take care to ensure that no unrecorded or unacknowledged rights are overlooked in the order-making process."*

## **REASONS FOR MAKING THE MODIFICATION ORDER**

8. The decision to make the Modification Order was based on all the evidence available to HCC, but particularly following the discovery of a Quarter Sessions diversion order ("the QS Order") made in 1845 (**HCC 10**).
9. Most orders diverting or extinguishing rights of way were made under the Highways Acts by the Quarter Sessions courts. Quarter Sessions were the local courts held four times a year since 1388 and which were superseded by the magistrates' court in 1972. Cases were decided by justices of the peace who dealt with petty criminal cases, the supervision of lunatic asylums, the licensing of public houses and highway matters. Orders could also be made under other Acts of Parliament, such as under the New Towns Commission, the Housing Acts, the Town and Country Planning Acts or the Defence Acts etc.
10. In all cases, these are legal orders which can include diversion or extinguishments of public rights. As these are legal documents they provide conclusive evidence of those matters the court actually decided, but are not conclusive in relation to other matters.
11. The Quarter Sessions rolls contain a diversion order dated 1845 relating to the Order Route. The plan forming part of the QS Order states it to be a "Plan showing the old and proposed new footpaths leading from Codicote to Stevenage through the Parish of Knebworth in the County of Hertford."
12. The plan shows two paths, one of which was extinguished under the QS Order, and the other of which was created. The path that was extinguished runs from a point west of the village of Knebworth, to the west of Knebworth House, along the line of Cowley Corner Wood (which lies to the west of the Novotel) and into Stevenage parish at point E on the Modification Order Plan. The path that was created in its stead follows the line of the Order Route. It is described in the QS Order (**HCC 11**) as a footpath commencing from:

*“Horn Lodge situate on the south east side of Knebworth Park aforesaid for the space of one thousand one hundred and sixty seven yards or thereabouts and from thence on a northward direction across the said Park for the space of eight hundred and thirty nine yards or thereabouts and thence in the said direction across a field called “Horse Leys” in the said Parish of Knebworth belonging to the said Sir Edward George Earle Lytton Bulwer Lytton for the space of four hundred and eighty seven yards or thereabouts and from thence along the north east side of another field called “Cow Leys” in the same Parish belonging to the said Sir Edward George Earle Lytton Bulwer Lytton for the space of three hundred and eleven yards or thereabouts to the north corner of the same field where the same enters the present Footway.”*

13. The Quarter Sessions rolls also contain the necessary magistrate’s certificate **(HCC 12)**, showing that the new footpath was constructed to the satisfaction of the justices of the peace. No evidence of the Order Route having subsequently been stopped up has been discovered.
14. HCC decided that the QS Order set out a public footpath along the line of the Order Route and that as no evidence demonstrating its subsequent stopping up had been found, the maxim ‘once a highway always a highway’ means that on the balance of probabilities the footpath still exists.
15. As neither the QS Order nor the accompanying certificate make any reference to the new footpath’s width HCC decided to record the Order Route with a width of 2 metres, based on its own policy of the desired minimum width for newly created footpaths.
16. No other documents that HCC considered during its investigation of the application showed the Order Route. This is perhaps unsurprising as it is a public footpath, as many historic documents do not routinely show public footpaths. Having been diverted onto its new line in 1845, the Order Route may have fallen into disuse by the late 19<sup>th</sup> century and the date of the next documents likely to show it, being the Ordnance Survey maps.

## **AFTER THE ORDER WAS MADE**

17. After the Modification Order was made and advertised HCC commenced negotiations for its diversion with Knebworth Estates. The Estate was concerned that its tourist income would be affected by the existence of a public footpath through its children’s play area. HCC also had concerns about the potential health and safety impact of the northern junction of the footpath on the motorway roundabout. Both parties therefore sought an alternative that would have a less

detrimental impact upon the Estate's business and be a more convenient route for the public.

18. The Hertfordshire County Council (Knebworth Park) Creation Order 2014 ("the Creation Order") and the Hertfordshire County Council (Knebworth 21 and 44 and Stevenage 108) Extinguishment Order 2014 ("the Extinguishment Order") (**HCC 13 and 14**) were made pursuant to sections 26 and 118 of the Highways Act 1980 on 11<sup>th</sup> December 2014.
19. The Extinguishment Order as made extinguished all of the Order Route as well as the eastern end of Knebworth Footpath 21. The Creation Order replaced these paths with a public footpath varying in width between 2.5 metres and 3 metres from the junction with Knebworth Footpath 21, around the eastern boundary of the park woodland, to join Knebworth Byway Open to all Traffic 41 south of Norton Common.
20. As the Order Route was set out as a public footpath pursuant to the 1845 QS Order and no further evidence of its existence or status has been found HCC is satisfied on the balance of probabilities that no higher rights exist that may be unaffected by the Extinguishment Order.
21. The Creation and Extinguishment Orders were advertised in accordance with Schedule 6 of the Highways Act 1980 on 15<sup>th</sup> January 2015. Objections were received and a public inquiry was held to determine the Creation and Extinguishment Orders on 21<sup>st</sup> February 2017. On 28<sup>th</sup> March 2017 the inspector issued his decision (**HCC 15**). This confirmed the Extinguishment Order as made and confirmed the Creation Order subject to the inclusion of a pinch point as a limitation. Both orders came into effect upon the date of confirmation.
22. The confirmation of the Creation and Extinguishment Orders was advertised on 13<sup>th</sup> April 2017. During the advertising period no application was made to the High Court to challenge the inspector's decision. HCC is now preparing the legal event modification order to record the footpath created by the Creation Order to the DMS.

## **CONCLUSION**

23. The QS Order showed on the balance of probabilities that a public footpath was created along the line of the Order Route in 1845. No subsequent evidence has been discovered that suggests that it was stopped up at any point after that. As HCC has a duty to make modification orders where evidence shows that a public right of way exists the Modification Order was made. However, HCC accepted

that the Order Route lay upon a line that was inconvenient to the landowner and unlikely to be well-used by the public, and so made concurrent Extinguishment and Creation Orders to delete the Order Route and create a more suitable alternative. As the Extinguishment Order was confirmed and has come into effect, and the confirmation has not been challenged, the Order Route has been deleted.

24. Hertfordshire County Council therefore respectfully requests that the Inspector does not confirm the Modification Order.