

# HERTFORDSHIRE COUNTY COUNCIL



## Rights of Way Service

### Modification Order Application Decision Report

Application to extinguish Tring Rural Footpath 43

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## Application Details

An application has been made to delete a footpath from the Definitive Map and Statement near Wilstone. Tring Rural Footpath 43 ("Footpath 43") runs from the bank of Wilstone Reservoir to the Lower Icknield Way. An extract of the 2015 Definitive Map is attached. It shows where the route is, labelled points A-B-C and D-B.

This application was made by Mrs Mavis Foy of Acacia Walk, Tring on 10<sup>th</sup> November 2014. It was made in the prescribed form and contained copies of the evidence upon which Mrs Foy seeks to rely, which is detailed in the report below.

## Description of Route

Footpath 43, sometimes known as Wells Lane, lies south of the rural village of Wilstone, which itself lies in the Chilterns near the Hertfordshire/Buckinghamshire county boundary, approximately 2.5 kilometres north west of Tring. The footpath lies between the Wilstone Reservoir and the Lower Icknield Way, which divides the village of Wilstone from the reservoir.

Footpath 43 commences from a junction with Footpath 45 at point A on the attached plan. It continues north west towards the Lower Icknield Way. At point C it divides and has two exits onto the Lower Icknield Way at points D and E.

Near point C Footpath 43 passes alongside a plot of land next to P E Mead and Sons Farm Shop, shown on the map as Wilstone Little Farm. In the 19<sup>th</sup> century this plot of land consisted of a number of cottages, which are the subjects of the deeds referred to in section 7 below.

## Weight of evidence and burden of proof

Section 56(1) of the Wildlife and Countryside Act 1981 states that "where the [Definitive] Map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot". The Department of Environment's Circular 1/09 states that in the event of applications to delete or downgrade paths shown on the Definitive Map "the evidence must be of sufficient substance to displace the presumption that the Definitive Map is correct" (paragraph 4.33). The burden of proof therefore lies with the applicant to show that the Definitive Map is incorrect. This view was approved in the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 WLR 1264, where the judge held that an inspector deciding whether a right of way existed had to start with the initial presumption that it did. The standard of proof required to show that it did not was the balance of probabilities.

## Relevant matters

The width of part of Footpath 43 between points E-B-C has already been determined by the County Court in a judgement of 10<sup>th</sup> February 2015 by Recorder Hancock QC in response to a claim for obstructing the legal width of Footpath 43 brought against Mr and Mrs Foy by

Dacorum Borough Council. The court's judgement dealt in detail with various property deeds, the Inland Revenue documents and Ordnance Survey maps.

The court held in favour of Dacorum Borough Council, that Footpath 43 is a public footpath, and has a width of 6 metres between points B-C-D on the investigation plan. Its findings can be summarised as follows:

- The only reference to Wells Lane being a private road is in the earlier conveyances (see section 7 below).
- By the time of the later conveyances all reference to Wells Lane being private has disappeared, and none of the cottages have a private right of access over it. This is consistent with it having become a public right of way.
- Had Wells Lane remained private the canal company, as owners of the land at the date of the first conveyance, would have charged a levy for the public's use of it.
- The Inland Revenue documents (see section 8 below) show that in 1910 Wells Lane was not in private ownership, and the most likely explanation for that was that it was a public right of way.
- The Ordnance Survey maps (see section 11 below) consistently show the width of Wells Lane as being between 6-7 metres.

The court's findings are described in more detail where applicable below.

Mr and Mrs Foy applied for leave to appeal the judge's decision but that application was rejected in January 2016.

## Documentary Evidence

For each investigation, we check at least 10 primary sources of information for any historic evidence relating to the application route. You can view the documents listed below at Hertfordshire Archives and Local Studies (HALS), at the Rights of Way Service (ROW) or at The National Archives (TNA). The documents are listed below with a reference number (if it has one) and where you can find it.

For further information contact:

- Hertfordshire Archive and Local Studies - 0300 123 4049 or their website at [www.hertsdirect.org/services/leisculture/heritage1/hals/](http://www.hertsdirect.org/services/leisculture/heritage1/hals/).
- Rights of Way Service - 01992 555279 to make an appointment.
- The National Archives – 020 8876 3444 or <http://www.nationalarchives.gov.uk/>.

If you would like more information about documents and how they are important in investigating public rights of way, please go to the Planning Inspectorate's website and view their Guidance Booklet for Definitive Map Orders: Consistency Guidelines. See <https://www.gov.uk/guidance/object-to-a-public-right-of-way-order> which also gives details about related articles and case law.

Where the document shows information relevant to the area of the application route, it is listed with the following information:

- the document's name, date and where it can be found (location and reference)
- why we consider the document important when making our decision

- what is shown by the document in the area of the application route
- investigating officer's comments.

Please note that where there are no records for the document listed, this will just be recorded as "no records found."

## A History of Wilstone Reservoir

Wilstone Reservoir has not always existed as shown on current maps and so its development over the years must be taken into account when assessing the documentary evidence detailed in this report. It was built in 1802 as a means of re-filling the Wendover Arm of the Grand Union Canal, which would lose 20,000 litres of water every time the locks opened during its passage over the Chiltern Hills. The initial expanse of the reservoir covered the south western corner of the current area and is shown on Bryant's county map of 1822 (see section 2 below). It was doubled in size in 1835 by an extension east towards Little Tring, and in 1839 it reached its current size with the addition of the northern section near the car park on the Lower Icknield Way.

### 1. Dury and Andrews' Map

Date: 1766 Ref: HALS - CM26

#### 1.1 Why we consider this document important

Dury and Andrews' 1766 county map of Hertfordshire describes itself as '*a Topographical map of Hartford-Shire, from Actual survey; In which is Expressed all the roads, lanes, churches, noblemen and gentlemen's seats, and every Thing remarkable in the County*'. It is a map made from an original survey, although it is a schematic map (like the London Underground map) rather than one to scale. In this way its level of accuracy does not match modern Ordnance Survey maps, but it is useful evidence for the existence of routes in the 18<sup>th</sup> century. The Planning Inspectorate's *Consistency Guidelines* state that "Overall, the evidential value of the older maps can be significant in helping to determine the location of a way, and can be helpful in determining the status of a route, especially in conjunction with later maps." Dury & Andrews' map shows the basic layout of roads but details like field boundaries were probably decorative. The "explanation" (or legend) lists 'Roads' in 3 categories – "open", "one side enclosed by a Hedge", and "enclosed by Hedges". It does not appear to show routes which, at the time, were thought to be footpaths or bridleways. The map was produced to be sold to members of the public which mean that it is likely the routes shown were public rather than private. As public roads prior to 1835 were maintainable by the parish, it is likely that routes shown are now publicly maintainable.

#### 1.2 What is shown by this document in the area of the application route?

Dury & Andrews' map pre-dates the construction of Wilstone Reservoir. The map shows the road network as broadly similar to the current day, with the Lower Icknield Way being pictured running east-west, as well as its junction with the Tring Road which leads north into Wilstone, near point E on the plan. These known public roads are shown as "roads enclosed by hedges". A further road pictured in the same manner as the Lower Icknield Way and Tring Road heads in a southerly direction from a point just west of that junction, on a similar line as the current Footpath 43. This continues generally south, through what would become the

reservoir and past Miswell Farm south of the reservoir, until it joins the crossroads at Little Tring Road and the Icknield Way.

### 1.3 Court's findings in respect of the document

The court did not consider Dury & Andrews' county map as it does not contain evidence relating to the width of the route.

### 1.4 Decision

Dury & Andrews' map shows the application route exists and is shown as a highway in the same manner as other known public roads. HCC decided that this document provides supporting evidence that Footpath 43 was correctly recorded on the DMS.

## **2. Tring Inclosure Records**

Date: Act 1797; award 1799; map 1804

Act ref: D/EX437/Z14

Award and map ref: D/P111/26/1 and D/P111/26/2

### 2.1 Why we consider these documents important

Enclosure was the process of physically changing the landscape to benefit the development of modern farming practices as technology improved. It was popular from the late medieval period to the 19<sup>th</sup> century and carried out on a parish-by-parish basis. As it changed the layout and size of fields it also changed the routes of roads and rights of way.

Inclosure was the legal process of carrying out the physical changes. It could be carried out by agreement, but where this was not possible an Act of Parliament was needed to grant the powers to make the desired changes. Through time such Acts became more popular than agreements. Prior to 1801 these powers were granted to each parish individually by private Acts of Parliament. In 1801 the first General Act was passed which could be used by any parish. Further General Acts were passed in 1836 and 1845. However, private Acts

continued to be obtained if the required powers were not granted by the General Acts. They are important evidence to show us what powers the commissioners had and, if available, they should be read in conjunction with the Inclosure Award and Inclosure Map, which recorded the inclosure process.



The award is the written record of the changes that were made. It lists the lands that were given to each landowner, the roads and rights of way that were stopped up and those that were set out, or created. The map (which was not legally required until 1845) shows pictorially the changes made and as such tended to be drafted after the changes had taken place on the ground as a record of what had happened, rather than being a plan of what would happen.

As inclosure was a detailed legal process with powers granted by Parliament, it can give us conclusive evidence of a right of way.

## 2.2 What is shown by these documents in the area of the application route?

Tring was enclosed prior to the construction of Wilstone Reservoir which is why the reservoir is not shown despite the map being drafted in 1804. The inclosure map shows the Lower Icknield Way running east-west and its junction with the Tring Road, which leads north into Wilstone. These and other known public roads are coloured sepia. A number of cottages are shown lying on the southern side of the Lower Icknield Way over land which is now shown on maps as Wilstone Little Farm. A narrow field entry runs adjacent to the westernmost of these cottages, in the approximate position of Footpath 43 between points C-E. This entranceway is uncoloured and part of a large field plot which is numbered 269 and called the 13<sup>th</sup> allotment, and which was granted to Drummond Smith Esquire in exchange for allotments given to the Dean and Chapter. It is not set out as a public right of way in the accompanying award.

## 2.3 Court's findings in respect of the document

The court did not consider the inclosure records as this route was not set out in the inclosure award and so provides no evidence as to its width.

## 2.4 Decision

A route exists along the line of part of Footpath 43, but it appears to be the entrance to a field. It is not set out as a public right of way in the award, or indeed legally extinguished. HCC decided that as the inclosure documents did not address Footpath 43 they provide no evidence as to whether the footpath does or does not exist.

## **3. Canal Plans**

The Wendover Arm of the Grand Union Canal passed some distance north and south of Footpath 43, and so the canal plans do not cover the area in question. HCC decided that as the canal plans did not cover the land crossed by Footpath 43 they provide no evidence as to whether the footpath does or does not exist.

## **4. Highway Diversion/Extinguishment Records**

Whilst the road shown on Dury & Andrews' county map has clearly been physically stopped up to make way for the construction of the reservoir, and A. R Gomm's book (see section 12 below) refers to the Tring court rolls of 1800, no records relating to the legal work involved in the stopping up have been found. HCC decided that as no documents have been found they provide no evidence as to whether the footpath does or does not exist.

## **5. Bryant's Map**

Date: 1822

Ref: HALS - CM88

### 5.1 Why we consider this document important

Andrew Bryant's 1822 map of Hertfordshire was again drawn from an original survey. Its depiction is much more accurate (like an Ordnance Survey map) rather than being schematic. This may be due to survey equipment (theodolites) becoming commercially

available in the 1790s. The “explanation” (or legend) lists “Turnpike and Mail Roads”, “Good Cross or Driving Roads” and “Lanes & Bridleways”. It is unlikely that it shows routes which, at the time, were thought to be footpaths. Like Dury and Andrews’ map, Bryant’s map was sold to members of the public and cost 3-4 guineas. The commercial nature of the map means that routes shown are likely to be public unless there is strong contemporary evidence which shows that routes are private. As public roads prior to 1835 were maintainable by the parish, it is likely that routes shown are now publicly maintainable.



### 5.2 What is shown by this document in the area of the application route?

Bryant’s map shows the first phase of Wilstone Reservoir, which was built in 1802. The Lower Icknield Way and Tring Road are shown as “good cross or driving roads”. A route along the line of Footpath 43 is shown in the same manner as other known public roads. It leads south, past the cottages, from the junction of the Lower Icknield Way and Tring Road. It is shown as a cul de sac that dissipates after it passes the cottages before being shown again further south as it passes Miswell Farm and joins the Icknield Way just north of Tring.

### 5.3 Court’s findings in respect of the document

The court did not consider Bryant’s county map as it does not contain evidence relating to the width of the route.

### 5.4 Decision

A highway is shown running on a similar line to Footpath 43 in the same manner as other known public roads. It is not shown as a through-route, but is instead shown ending at a point approximate to the edge of what would become the extension to the reservoir. HCC decided that whilst Bryant’s map is evidence that the footpath physically existed at that time, in this case it does not provide evidence as to whether it was public or private.

## **6. Tring Tithe Map and Tithe Apportionment**

There are no tithe records for the parish of Tring.

## **7. Property Deeds**

Date: 1835-96

Ref: RoW

### 7.1 Why we consider these documents important

Conveyances are documents that transferred ownership of private property and private rights over such property. They may grant rights of way to allow access to the property, but these would be private rights of way that would have been granted by the landowner. Public highways exist independently of land sales and so it was not necessary to refer to them in conveyances. Accordingly, if a conveyance or transfer does not refer to a public right of way

this is not evidence that the public right of way does not exist. Conversely, if a conveyance does refer to a public right of way, it is only supporting evidence of the existence of that right.

## 7.2 What is shown by these documents in the area of the application route?

Mrs Foy included with her application two plans which appear to be the plans annexed to two incomplete copies of conveyances dated September 1895. These and other deeds were supplied by the Foys during the court proceedings into the width of the path. The deeds are in black and white, incomplete and difficult to read, however it is possible to see that they all relate to Footpath 43. The judge listed them in his judgement follows:

*“1. The earliest relevant material to which I was referred by either party was a conveyance dated in 1835... What the conveyance appeared to show ... was the following:-*

- a) a road had gone over the land which was to become the Wilstone Reservoir;*
- b) that land was conveyed by the owners to the Canal Company which was building the reservoir;*
- c) there would be a replacement road;*
- d) the original road would be closed off.*

*2. In the years after 1835, there were a number of conveyances which were put before me... The relevant conveyances are those which, in my judgment, lead up to the 1895 conveyances to which I make reference in the following subparagraph. That is because these conveyances relate to the properties bounding the road which had gone to what was to become the reservoir, and they are as follows:-*

- (a) An indenture dated 29<sup>th</sup> September 1886 from John Hall and Thomas Newman as trustees to Joseph Hare. The land [was] bounded on the west by land belonging to Lord Rothschild, on the south by a piece of garden ground belonging to George Gurney, and on the east by a road or lane known as Wells Lane. I was also shown a mortgage relating to this property which described it in similar terms, the mortgagee being William Baines. I will refer to this package of land as Package A.*
- (b) An indenture dated 18<sup>th</sup> February 1887 between Lord Rothschild as owner and John Hall and Thomas Newman as buyers and tenants. This [transferred] land bounded by New Road to the north, land belonging to Daniel Hinton on the East, a private road leading to the swing bridge belonging to the Grand Junction Canal company on the West and the land belonging to Richard Grange on the south,*
- (c) An indenture dated 18<sup>th</sup> March 1887 between John Hall and Thomas Newman as sellers and Emma Goodson as buyer. This land was ... bounded by New Road to the north, land belonging to Daniel Hinton on the East, a private road leading to the swing bridge belonging to the Grand Junction Canal company on the West and the land belonging to Richard Grange on the south. ... This must have been the same parcel as was*

*transferred to Hall and Newman, referred to under (b) above.... I will refer to this package of land as Package B.*

*3. The next relevant material ... were various conveyances made in about 1895. These conveyances were of various properties, each of which were bounded, on one side or another, by a road or way called Wells Lane. That road or way would appear to have been the same road which had been closed off as a result of the building of the Wilstone reservoir. The properties in question were as follows:-*

- (a) A property owned by Marianne Scott, which was conveyed to Lord Rothschild by a conveyance dated 24<sup>th</sup> September 1895. That conveyance records that the property being transferred was bounded to north and east by hereditaments and premises belonging to Lord Rothschild, on the south side by a private road and on the west side partly by the High Road leading from Tring to Wilstone and partly by hereditaments and premises belonging to Mrs Emma Goodson. I will refer to this as Package C.*
- (b) A property owned by Joseph Hare but mortgaged to William Baines, transferred on 27<sup>th</sup> January 1896 to Lord Rothschild. That property was bounded on the west by land belonging to Lord Rothschild, on the south by a property then owned by George Gurney, and on other parts of the south and east by the road or way called Wells Lane, and on the north by the road leading from Tring to Wilstone and Drayton Beauchamp. This property must have been that referred to in subparagraph (2)(a) above (ie Package A), and I so find.*
- (c) A property owned by Mrs Emma Goodson, transferred on 27<sup>th</sup> September 1895. This property must have been that referred to in subparagraph (2)(c) above (ie Package B), and I so find.*
- (d) A property owned by Mr George Gurney, transferred on 7<sup>th</sup> February 1896, which was bounded to the north, south and west sides by property belonging to Lord Rothschild, and to the east side by a road or lane calls Wells Lane. This was clearly the property referred to as owned by Mr Gurney to in the description of adjoining property in the indenture under subparagraph (2)(a) above. I will refer to this fourth package of land as Package D."*

Also available but not referred to in the court judgement were undated sales particulars relating to Peartree Cottage and a smallholding "situate at Wilstone Green, fronting onto the Lower Icknield Way".

The Hare conveyance relating to Package A includes a plan showing Peartree Cottage, which lies to the west of point E on the plan. The Lower Icknield Way and Tring Road are shown and annotated "from Drayton Beauchamp", "to Tring" and "to Wilstone". Footpath 43 between points C-D and part of B-C is shown in the same manner as these known public roads and annotated "Wells Lane", which is described as a "road or way" in the text of the conveyance. That part of Footpath 43 between points C-E is shown as a narrow path crossing the property subject to the conveyance, and is annotated "public footpath".

Two deeds relating to Package B do not include plans. The February 1887 deed describes the “cottage or tenement ... lying on the East part of a Private Road leading to the Swing Bridge belonging to the Grand... [following page not supplied]”. The March 1887 conveyance describes the property as “lying on the East part of a private road leading to the Swing Bridge belonging to the Grand Junction Canal Company”. The Goodson conveyance on the other hand, does contain a black and white copy of the plan. This shows the Lower Icknield Way annotated “from Tring” and “to Wilstone”. The property conveyed is shown outlined in a heavier pen which may be red on the original. That part of Footpath 43 between points A and C is shown in the same manner as the Lower Icknield Way, running around the western and northern boundaries of the property. The property is described as “lying on the East part of a private road leading to the Swing Bridge belonging to the Grand Junction Canal Company”.

The Scott conveyance relating to Package C includes black and white copies of its plan. It shows two properties lying immediately to the east of Footpath 43 which are outlined in a heavier pen that may be red on the coloured original. The boundaries of the properties exclude the area over which Footpath 43 passes. The plan shows a route annotated “from Tring” which is the Lower Icknield Way and another annotated “to Wilstone” which is the Tring Road. That extent of Footpath 43 between points A and D is shown leading off the Lower Icknield Way in the same manner as the known public highways, but that section between points C-E is not shown at all. The property subject to the conveyance is described as being bounded on the “south side by a private road”.

The plan annexed to the Gurney conveyance (Package D) shows the field to the south of Peartree Cottage. It does not show the Lower Icknield Way, but it shows part of Footpath 43 between parts of points B-C-D as a wide track annotated “Wells Lane”, which is described as “a road or lane” in the body of the conveyance. The plan also shows that part of Footpath 43 between points C-E as a narrow double pecked route in the same manner as the Hare conveyance (Package A), although it is unnamed on the plan.

The undated sales particulars do not contain a plan or refer specifically to Footpath 43 or other highways. Instead clause 9 states that “Each Purchaser shall take over all the Vendor’s rights and liabilities in any water-courses and/or private roads leading to or adjoining the property purchased by him”.

### 7.3 Court’s findings in respect of the document

Recorder Hancock commented on the property deeds:

*“The picture painted by these conveyances is consistent. There were a series of properties, between which ran a road now known as Wells Lane. That lane had originally been a private road belonging to the canal company; but there is no reason to suppose that it remained so on the basis of the material in these conveyances.”*

The judge found that only the earliest conveyance describes Wells Lane as a private road and that even then the cottages were not granted a right of way over it. He further noted that the later conveyances make no reference to Wells Lane being private, and again grant no private right of way for the cottages, which in turn suggests that the route was public.

#### 7.4 Decision

The court found that the property deeds were supporting evidence that Footpath 43 was a public highway. The deeds from 1887 and 1895 refer to the land lying next to a private road, but the deeds from 1886 and 1896 refer to a “road or lane called Wells Lane”. No private rights of way are granted in the deeds, which HCC decided is supporting evidence that public rights existed over Footpath 43. The deeds are certainly not evidence that no public rights existed over Footpath 43, as private and public rights exist separately and the existence of one does not preclude the existence of the other. Furthermore, the Hare conveyance provides supporting evidence of the fact that a public footpath did exist between points C-E leading out of Wells Lane, meaning that the lane was presumably already a public footpath at that time.

### **8. Inland Revenue Documents**

Date: 1909-10

Ref: HALS IR1 257, IR1 258

PRO IR126/8/32, IR126/8/33

#### 8.1 Why we consider these documents important

The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. In order to ascertain the value of all land as at 30<sup>th</sup> April 1909, a survey was carried out assessing each piece of land. The OS 2<sup>nd</sup> Edition Plans (usually from 1898) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or ‘hereditament’ number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.

Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The whole process was carried out under statutory authority by the



Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry a high level of evidential weight as to the routes which they show to exist, but are unlikely to be good evidence that rights of way do not exist.

Where a route is shown uncoloured on the plans and excluded from the taxable land this provides very strong evidence of it being public highway. Usually this will be of vehicular status unless there is other contemporary evidence to indicate otherwise. Where footpaths and bridleways cross privately owned land these may be recorded as a reduction to the tax. However, where routes cross large hereditaments it

can be difficult to establish which route is considered to be the right of way without additional details.

### 8.2 What is shown by these documents in the area of the application route?

That part of Footpath 43 between points B-C-D is shown in full as a track with solid boundaries. This section is uncoloured and excluded from the surrounding plots. The southern part of the route between points A-B is included within the plot for Wilstone Farm which is numbered 1474. The map and accompanying reference book show that this plot is very large at 209 acres, and described as house, buildings and land owned by Lord Rothschild and in the occupation of Henry Woodward. A deduction of £200 was granted for public rights of way across the land.

That part of Footpath 43 between points C-E is marked on the OS basemap as a pecked line following a field boundary. It is included within plot 1393, which is described as a house and garden owned by Lord Rothschild and in the occupation of Harry Jeffs. No deduction was granted for public rights of way crossing the land.

### 8.3 Court's findings in respect of the document

Recorder Hancock in his judgement commented on the Inland Revenue documentation as follows:

*“As of this date ... all of the evidence suggests that there was a road running between the various different properties identified above, which had been a public road, but which had been closed as a result of the building of Wilstone Reservoir. The width of this road, taken from the maps of the time, would have been some 6-7 metres... That road was not owned by anyone, and was not private land. Instead it was a highway, and not assessable for this reason under the 1910 Act.”*

### 8.4 Decision

The depiction of Footpath 43 on the Inland Revenue plan is conflicting. The section between points A-B is included within Wilstone Farm, which is a large farm with a large deduction for public rights of way crossing it, some of which may relate to the footpath. Two thirds of the route between points B-C-D is uncoloured, suggesting that it was public vehicular highway. That part between points C and E is also coloured to be included in the adjacent plot, but there are no claims for tax deductions based on user. As the route is clearly referred to as a public footpath in the Hare conveyance of 1896 (see section 7 above) it is possible that Lord Rothschild was attempting to deny its existence. HCC decided that the Inland Revenue plans are supportive of the fact that Footpath 43 was a public highway in the early 20<sup>th</sup> century.

## **9. Highways Maintenance Records**

The application route is a publicly maintainable footpath recorded on the Definitive Map and so is maintained by the Rights of Way Service within HCC.

## **10. Definitive Map Records**

The National Parks and Access to the Countryside Act 1949 required the County Council to prepare a Definitive Map and Statement to show and describe the public rights of way in the

county. The Map is conclusive evidence of what it shows, but is without prejudice to what is not shown.

The process resulting in today's Definitive Map and Statement consists of several stages which are dealt with below:

- a) the Parish Survey
- b) the Draft Map, Provisional Map and first Map and Statement (1953)
- c) the Special Review (following the Countryside Act 1968)

## **10a Definitive Map Records – Tring Parish Survey**

Date: 1951 Ref: RoW

### 10a.1 Why we consider these documents important

Under the National Parks and Access to the Countryside Act 1949 the county was required to show all public paths which were defined as "footpaths", "bridleways" and "roads used as public paths". This last term was never properly defined and has resulted in much confusion ever since. There was no requirement to record public vehicular highways.

In Hertfordshire each parish carried out a survey of the paths which were believed to be public. Sometimes additional surveys were carried out by the Ramblers' Association or the Youth Hostel Association; or comments were made by them on the parish's survey. The surveys once completed were sent to the County Council for collating and publishing as the Draft Map.

### 10a.2 What is shown by these documents in the area of the application route?

The draft Parish Survey map shows Footpath 43 in full, although it was then named Footpath 70. That draft map also shows Footpath 45 along the embankment of the reservoir, then named Footpaths 71 and 73. The paths were surveyed by P C Birtchnell on 30<sup>th</sup> July 1951, who described Footpath 43/70 as "Path from Wilstone Reservoir to Wilstone Green. [Commencing] from junction of paths 71 and 73 this path descends the embankment of the reservoir very steeply, to a railing and continues along "arm" of a large field to a step stile, then along a short green lane. There are two exits to road; one veers right to a gap beside a short railing and other runs ahead between a short fence and hedge to the road at Wilstone Green".

The Parish Survey was approved at a parish meeting on 9<sup>th</sup> October 1951. By this time the paths had been renumbered as Footpaths 43 and 45. Footpath 43 is described in the statement as commencing "from FP 45 on NE side of Wilstone Reservoir thence NW to Wilstone Green, having two exits on the county road".

### 10a.3 Court's findings in respect of the document

The judge referred specifically to the surveyor's description in the Parish Survey, noting that whilst no indication of the legal width of Footpath 43 was given, its physical appearance as running along a green lane "is at least consistent with the fact that at this stage the path remained wider than a simple footpath".

#### 10a.4 Decision

Footpath 43 was recorded as a public footpath on the Parish Survey. Its physical description demonstrates that it already existed and was in use, to the extent that a railing had been built at the bottom of the embankment, and a stile existed beyond the embankment near point B. HCC decided that as the footpath was recorded in the Parish Survey without challenge it was considered to be a public footpath at the time.

### **10b Definitive Map Records – Draft, Provisional and First Definitive Map**

Date: Ref: RoW

#### 10b.1 Why we consider these documents important

The parish surveys were collated into the Draft Map and Statement. Notices were published advertising that the Draft Map and Statement had been produced so that the public (including landowners) could object to what was included or to what was omitted. Hearings were held to consider these objections and recommendations were made based on the evidence presented.

The Draft Map and Statement was amended following the hearings to produce the Provisional Map and Statement. As before, notice of the production of the Provisional Map and Statement was advertised but this time only landowners, lessees and tenants could apply to the crown court to amend the map – the public could not. The map and statement were then amended to reflect the court's finding.

Please note that these records vary across the county as a full sequence of Draft Map and then Provisional Map has not always been kept.

After the amendments to the Provisional Map and Statement were made, the First Definitive Map and Statement for Hertfordshire was produced. The Map and Statement together provide conclusive evidence of the existence of those public rights of way shown at the 'relevant date' of 1953; i.e. the information shown was correct at that date.

#### 10b.2 What is shown by these documents in the area of the application route?

No objections were made to the draft, provisional or final Definitive Maps. The map and schedules for the first Definitive Map were signed off by the clerk of the parish as including all bridleways and paths etc to the best of his knowledge and belief. The draft Map was advertised in the London Gazette and put on display in County Hall and in the post offices in Wilstone and Long Marston on 20<sup>th</sup> November 1953 for a minimum of four months. No objections to the recording of Footpath 43 were received during the advertising period.

#### 10b.3 Court's findings in respect of the document

The Court made no specific findings in respect of the draft, provisional or final Definitive Maps.

#### 10b.4 Decision

HCC decided that as the first Definitive Map was properly advertised and the recording of Footpath 43 without challenge it was considered to be a public footpath at the time.

**10c Definitive Map Records - Special Review**

Date: 1984 Ref: RoW

10c.1 Why we consider these documents important

The Countryside Act 1968 created the new designation right of way to be recorded - a "byway open to all traffic". This was the first time that vehicular rights were recorded on the Definitive Map. It also required county councils to carry out a Special Review to reclassify all "roads used as public paths" as either "footpaths", "bridleways" or "byways open to all traffic". In Hertfordshire the Special Review was started in 1977. This was later extended to include all the amendments to the network made by diversions since the first Definitive Map. It also showed if applications had been made to add or amend details of routes. Copies of the Special Review Draft Map showing all these changes were published, inviting objections from the public. Due to the number of objections received and not resolved, the Secretary of State ordered the abandonment of the Special Review in Hertfordshire in 1984. The Definitive Map and Statement was amended to show all changes which did not have outstanding objections, and these were shown on the Definitive Map and Statement produced in 1986.

10c.2 What is shown by these documents in the area of the application route?

A summary of all objections received at the time reveals that on 2<sup>nd</sup> April 1984 Mr Foy wrote to HCC disputing the line of the footpath and arguing that it had been impassable for years. A note on the file states that this letter was not considered to be an objection relevant to the Special Review and that it was being dealt with separately by Dacorum Borough Council and HCC. Mr and Mrs Foy did not formally object to the inclusion of Footpath 43 in the Special Review.

10c.3 Court's findings in respect of the document

The Court made no specific findings in respect of the Special Review.

10c.4 Decision

HCC decided that whilst Mr Foy he had concerns about the path at the time of the Special Review he did not make a formal objection accompanied by evidence that Footpath 43 was incorrectly recorded.

**11. Ordnance Survey maps**

Date: 1882-92, 1899, 1924 Ref: HALS reading room

11.1 Why we consider these documents important

The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars in order to better plan the transportation of ordnance around the country. It was only in the early 20<sup>th</sup> century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.

The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps

they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2<sup>nd</sup> edition maps (circa 1897/8 in Hertfordshire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

### 11.2 What is shown by these documents in the area of the application route?

The first edition OS map of 1882-92 shows Footpath 43 between points B-C-D as a wide route with solid boundaries that leads off the Lower Icknield Way. It widens towards point B and a double pecked line runs down its centreline. A gate or other such barrier can be seen south of point B which has the effect of dividing Footpath 43 into two plots numbered 364 and 368. These numbers relate to the OS name books, and name the plots “road” and “pasture” respectively. That part of Footpath 43 between points C-E is shown as a narrow path lying next to a solid boundary such as a hedge.



By the second edition OS map of 1899 that part of Footpath 43 between points B-C-D is still clearly a track leading off the Lower Icknield Way, but it has lost its solid boundaries as it runs south of point B, and instead merges with the field. The gate/barrier south of point B is still visible. The double pecked lines show the route that is presumably used. That part of Footpath 43 between points C-E is again shown as a single pecked line adjacent to the field boundary.

The 1924 edition shows Footpath 43 between points B-C-D in much the same way as the second edition. The gate/barrier south of point B is still visible. That part between points C-E has become a path with solid boundaries either side, although it is braced to the surrounding plots.

### 11.3 Court's findings in respect of the document

The court held that the earlier OS maps showed the route as “a road or track running between solid lines representing hedges”. It found that the later OS maps were consistent with this and supportive of Footpath 43 having a width of between 6-7 metres.

### 11.4 Decision

The OS maps show that part of Footpath 43 between points B-C-D as a track leading off the Lower Icknield Way and describes it as a “road”. A gate or other barrier appears to have been present between points A and B. The boundaries of Footpath 43 south of point B appear to have faded over the years, but the presence of pecked lines suggests that it was still a path that was used. HCC decided that Footpath 43 between points C-E appears to have existed for as long as the rest of the route, a fact shown by its inclusion on the first edition OS map of 1882-92, the 1896 Hare and Gurney conveyances (see section 7 above) and the second edition OS map of 1899. The presence of Footpath 43 on the OS maps is

only evidence of its physical existence, and does not provide evidence of what rights existed over it.

## **12. Extract of “History of Wilstone” by A. R. Gomm**

Date: 2001

Ref: [www.stcross.nildram.co.uk](http://www.stcross.nildram.co.uk)

### 12.1 Why we consider these documents important

An extract of the above website was provided by Mrs Foy with her application. A. R. Gomm has written a local history of Wilstone and the local area, based upon inhabitants' recollections. The extract provided with the application is entitled *Wilstone Deans Lane, The Moors and Black Moor*.

### 12.2 What is shown by these documents in the area of the application route?

Mrs Foy highlighted a section of the extract as follows:

*“What must have concerned the villagers most was the closing of the centuries old lanes, especially the one crossing the Moors into Tring. This lane, which left the south-western corner of the village green, passed behind the present Pear Tree Cottage, was known until recent years as Deans Lane, for some years Wells Lane but throughout the 19th century as Newmans Lane, Mr Newman being the owner of the wheelwright's business. After passing over the Moor and Miswell Hill, this followed a winding track past Miswell Farm eventually reaching the Upper Icknield Way opposite Miswell Lane.*

*From the Tring Court Rolls of 1800, with the taking over of the land this lane was then declared a private road. A swing bridge was placed across the Wendover Arm for the purpose of access to the fields and pumping station, leaving a footpath through Little Tring. To compensate for the change, the new road, which passes the cemetery over Wilstone Hill, was opened but the gradual taking over of the land must have affected a number of families who occupied the small closes along the old lane. From this early map one can see where a number of these were situated.”*

### 12.3 Court's findings in respect of the document

The court did not consider A. R. Gomm's writings.

### 12.4 Decision

A. R. Gomm describes the old route of Footpath 43, known as Wells Lane in the late 19<sup>th</sup> century, before the extension of Wilstone Reservoir. He describes it passing Peartree Cottage and continuing south until it passed Miswell Farm and Miswell House before joining the Icknield Way on the northern boundary of Tring, opposite Miswell Lane. The ancient line of this road can be seen on the modern OS maps. HCC decided that A. R. Gomm's research supports the presumption that the old Wells Lane was stopped up when the reservoir was extended. Whilst the research is not clear, it appears to imply that a footpath was retained from Wilstone Green that continued over the swing bridge and through Little Tring, which today is recorded as Footpath 46.

### 13. Historic Photographs

Date: unknown

Ref: Leeds University

#### 13.1 Why we consider these documents important

A local resident provided a link to this historic photograph of the route. Historic photographs can be useful as they show what the route used to look like. They can also give an indication of the width of the route. Their limitations are that they are a snapshot from the time at which they were taken and so do not provide evidence for the route as a whole. They also only provide evidence of what was physically on the ground, rather than what legal rights existed over the route.

#### 13.2 What is shown by these documents in the area of the application route?

The photograph is in Leeds University's archives and described as "Wilstone Little Farm and Cottage. A country road on the right of the frame is situated next to farm buildings with thatched roofs and wooden panelled walls to the left. There are small trees dotted about, and an open fence gate is visible". The photograph is undated. It shows farm buildings lying on the left hand side of a wide unsurfaced track, with a hedge running along the right side of the track. The track curves to the right in the distance.

#### 13.3 Court's findings in respect of the document

The court did not consider the photograph.

#### 13.4 Decision

The photograph is not clear as to whether it shows the farm buildings on the Lower Icknield Way looking towards point D, or whether it shows Footpath 43 towards point C. HCC decided that it is clearly a wide track and would be used as an access for the farm buildings and so is supportive of the OS maps' evidence of the width of Footpath 43 being between 6-7 metres. No conclusions can be drawn as to the public rights that existed over the route at the time.

### Conclusion

Section 56(1) of the Wildlife and Countryside Act 1981 states that the Definitive Map and Statement is conclusive evidence of the rights that it shows, and this must be the basis upon which the evidence in relation to this application is assessed. Furthermore, the courts have given guidance on how evidence is to be considered when determining applications to record public rights of way on the Definitive Map and Statement. In the case of *Fortune and Others v Wiltshire Council and another* [2012] EWCA Civ 334, Lewison LJ commented on the way in which the available evidence should be assessed:

"In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact-finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact-finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB directed the jury in *R v Exall* (1866) 4 F & F 922:

*It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."*

HCC's decision is therefore based on the assessment of all the evidence taken together, rather than on one individual piece of evidence. The earlier maps demonstrate that Footpath 43 was originally a vehicular through-route that was stopped up when Wilstone Reservoir was extended in the 1820s and 30s. No stopping up order has been found, meaning that no evidence has been discovered as to whether rights were retained. After the reservoir was completed, up until the first Definitive Map, Footpath 43 is variously shown as a public road, a private road and a public footpath. On the first Definitive Map it was recorded as a public footpath, which was never challenged by the landowners or any other person, until now. HCC decided that none of the evidence discovered in respect of Footpath 43 is sufficient to outweigh the presumption that the DMS is correct in recording the route as a public footpath, or indeed to suggest that it was incorrectly recorded on the first DMS.

# Application to extinguish Tring Rural Footpath 43

- Application route 
- Public footpath 
- Public bridleway 



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