

Deletion or downgrading of ways shown on the definitive map and statement

4.30 The procedures for identifying and recording public rights of way are comprehensive and thorough. Authorities will be aware of the need to maintain a map and statement of the highest attainable accuracy. Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded or deleted, particularly where recent research has uncovered previously unknown evidence or where the review procedures have never been implemented, it is unlikely that such a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.

4.31 Once prepared, and until subsequently revised, the definitive map and statement is conclusive evidence in rights of way disputes. Authorities are under a duty to make an order modifying the definitive map and statement where they have evidence that a public right of way should be downgraded or deleted. They may discover evidence themselves or evidence may be presented with an application to modify the map and statement.

4.32 Notwithstanding the clear starting point in relation to the possible deletion or downgrading of ways described in paragraphs 4.30 and 4.31, the powers in section 53(3) of the 1981 Act include the making of orders to delete or downgrade rights of way shown on the definitive map and statement in cases where evidence shows that rights did not exist at the time when they were first shown on the map. In making an order the authority must be able to say, in accordance with Section 53(3) (c) (ii) or (iii), that a highway of a particular description ought to be shown on the map and statement as a highway of a different description; or that there is no public right of way over land shown in the map and statement as a highway of any description.

4.33 The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with “higher” rights to a way with “lower” rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:

- the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.
- the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;
- the evidence must be cogent.

While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified.

4.34 Applications may be made to an authority under section 53(5) of the 1981 Act to make an order to delete or downgrade a right of way. Where there is such an

application, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted. The authority is required, by paragraph 3 of Schedule 14 to the Act, to investigate the matters stated in the application; however it is not for the authority to demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to delete or downgrade the way.

4.35 In the case of deletions, earlier guidance indicated that a case for presumed dedication could be established on a way that had previously been recorded on the definitive map but which was found, subsequently, to have been recorded in error. This was based on the belief that user, between the time of the first recording of the way on the definitive map and statement and the time when it was determined that an error had been made could give rise to presumed dedication. The date of first recording means either the date of the original publication of the first definitive map; the date of publication of a review; or the relevant date of an order adding the path to the definitive map, whichever was appropriate. The date of first recording would have been the first point in time at which it could have been legally recognised that rights over the way were recorded in the form being challenged. Defra believes that this advice was wrong. Defra's view is that use of the way in such circumstances cannot be seen to be as of right, as rights that cannot be prevented cannot be acquired. It is not possible for a right of way to be dedicated for the purposes of section 31 of the Highways Act 1980 when use of the way is by virtue of it having been shown on the definitive map but subsequently removed.

Appendix B – extract from Planning Inspectorate DMMO consistency guidelines

Deletion and downgrading

4.18 When considering whether a right of way already shown on definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored), there can be no reason to consider it. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all. See Section 4 of Circular 1/09 and paragraphs 4 and 7 of WO Circular 45/90.

4.19 Trevelyan confirms that cogent evidence is needed before the Definitive Map and Statement are modified to delete or downgrade a right of way. Lord Phillips MR stated at paragraph 38 of Trevelyan that:

“Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.”

4.20 In the Leicestershire case the Inspector refused to confirm an order which sought to modify the definitive map and statement to show a path which was shown on the map as running through the curtilage of one cottage, as running through the curtilage of another. Collins J held that in these circumstances, *“it is not possible to look at (i) [s53(3)(c)(i)] and (iii) [s53(3)(c)(iii)] in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed”* He went on *“If [the Inspector] is in doubt and is not persuaded that there is sufficient evidence to show the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive.....where you have a situation such as you have here, it seems to me that the issue is really that in reality section 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right –*

that a change should take place. The presumption is against change, rather than the other way around”.

4.21 Another case relevant to deletions is Kent. The Inspector refused to confirm an order under S53(3)(c)(iii) on the basis that the confirmed order would have deleted the whole of the footpath whose position but not existence was in dispute. In upholding the decision, the judge stated that *it seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt.*

4.22 The correct way to remove from the definitive map rights whose existence was not in doubt would have been to extinguish (or divert) them under the Highways Act 1980. As the judge continued: *one would expect to look elsewhere [than s53(3)(c)(iii)] for statutory provisions which were concerned with the question whether or not an established right of way (but not its route) should continue to exist.*

4.23 Previous guidance has indicated that, in the case of a way that had been incorrectly shown on the definitive map, a case for dedication could be established on the basis of use in the period between the first recording of the way and its subsequent removal. The current view of Defra (as stated in Circular 1/09 version 2) is that it is not possible for a right of way to be dedicated for the purposes of section 31 of HA 80 when use is by virtue of it already being shown on the definitive map; use in such circumstances cannot be acquired.

H0V.142
D112.142

PUBLIC PATH DIVERSION ORDER

HIGHWAYS ACT 1980

KIRKLEES METROPOLITAN COUNCIL

**(PUBLIC FOOTPATH NO. 49 BATLEY (PART) -
HIGH BARN HEYBECK LANE BATLEY)
PUBLIC PATH DIVERSION ORDER 1992**

WHEREAS it appears to the Kirklees Metropolitan Council as respects the footpath referred to in paragraph 1 of this Order that in the interests of the owner of the land crossed by the path it is expedient that the line of the path should be diverted.

NOW THEREFORE the Kirklees Metropolitan Council in pursuance of the powers in that behalf conferred by Section 119 of the 1980 Act hereby make the following Order:

1. The public right of way over the land situate at High Barn Heybeck Lane Batley shown by bold black dashes on the map annexed hereto and described in A of the Schedule hereto shall be extinguished at the expiration of 28 days from the date of confirmation of this Order.
2. There shall be at the expiration of 28 days from the date of confirmation of this Order a public footpath over the land situate at High Barn Heybeck Lane Batley described in B of the Schedule hereto and shown by bold black dots on the map contained in this Order.
3. This order may be cited as the Kirklees Metropolitan Council (PUBLIC FOOTPATH NO. 49 BATLEY (PART) - HIGH BARN HEYBECK LANE BATLEY) Public Path Diversion Order 1992.

SCHEDULE

A

Description of site of existing path

A public footpath 1.2 metres wide, shown by a broken black line on the map annexed hereto, commencing at its junction with Batley Footpath 55, north of High Barn, at map reference 2744 2445, marked X on the map, and continuing southwesterly for approximately 95 metres, across the property boundary, and then along the north side of a field boundary, to map reference 2735 2441, marked Y on the map, being part of public footpath number 49 in the former Urban District of Batley.

B

Description of site of new path

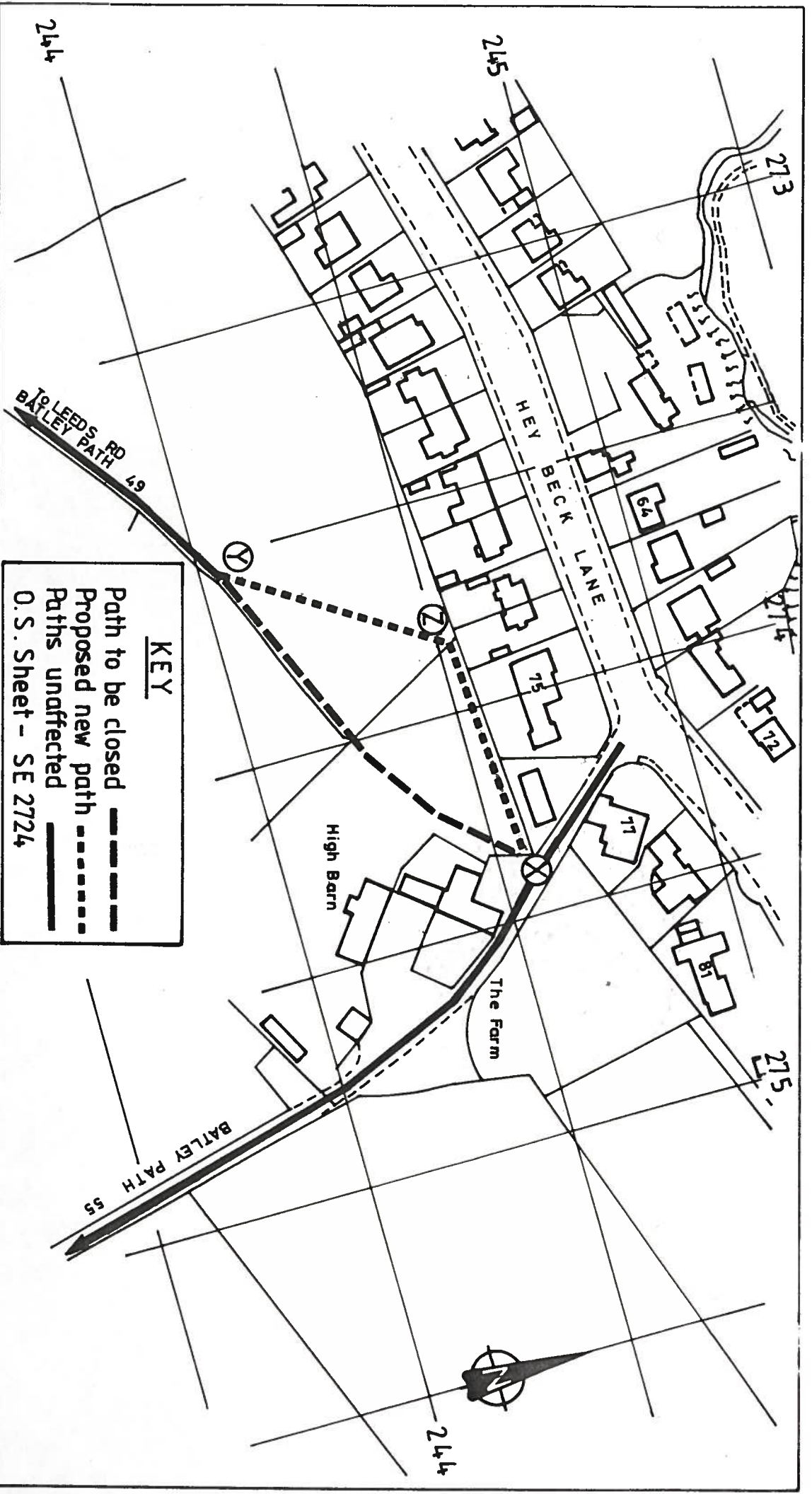
A public footpath 2.0 metres wide, shown by a dotted black line on the map, commencing at its junction with Batley Footpath 55, at map reference 2744 2445, marked X on the plan, and continuing in a westerly direction for approximately 55 metres to the property boundary at map reference 2738 2445, marked Z on the map, and thence in a southwesterly direction for approximately 55 metres to rejoin the existing path at map reference 2735 2441, marked Y on the map.

GIVEN under the Corporate Common Seal of **THE COUNCIL OF THE BOROUGH OF KIRKLEES** this Eighteenth day of August One Thousand Nine Hundred and Ninety Two

THE CORPORATE COMMON SEAL of)
THE COUNCIL OF THE BOROUGH OF)
KIRKLEES was hereunto affixed)
in the presence of:-)



Mr. F. House
Solicitor to the Council



KEY

Path to be closed - - - - -

Proposed new path

Paths unaffected ————

O.S. Sheet - SE 2724

Title

**PROPOSED DIVERSION OF BATLEY PATH 49 (part)
at HIGH BARN, HEY BECK LANE.**



Kirkless

TRAFFIC AND HIGHWAY

DEVELOPMENT MANAGER

P.F. JARRISON
CHRO. MICE, NINT. ROHM.
OLDSAY HOUSE, SALISBURY,
WILTSHIRE, WYON.

Scale

approx. 1 / 1250

Drawn

E N

Checked

Section

D.C.

Date

JULY 1992

Dwg / Ref No.

Dated: 18th August 1992

**KIRKLEES METROPOLITAN COUNCIL
(PUBLIC FOOTPATH NO. 49 BATLEY (PART) -
HIGH BARN HEYBECK LANE BATLEY)
PUBLIC PATH DIVERSION ORDER 1992**

**M R G VAUSE
Solicitor to the Council
Kirklees House
Market Street
Huddersfield
HD1 2TG**



Kirklees
METROPOLITAN - COUNCIL

Solicitor to the Council
Michael R G Vause
Legal Services

Second Floor
Civic Centre III
Huddersfield HD1 2TG

Tel: 0484 422133
DX: 712986 Huddersfield
Fax: 0484 442231

29th April 1994

All lines have Direct Dialling - prefix extension number with 44

If calling please ask for Miss Haigh Ext 2892

Our Ref: P & H/SJH/JM/D112.142

Your Ref: 8.7.2.1(49)/JKAW/FMH

MEMORANDUM

To: Traffic & Highway Development
Oldgate House
Huddersfield

For the attention of Mr Rod Dailey, Registry Engineer

**KIRKLEES METROPOLITAN COUNCIL PUBLIC FOOTPATH NO. 49
BATLEY [PART] - HIGH BARN, HEYBECK LANE, BATLEY, PUBLIC
PATH DIVERSION 1992**

Attached for your information is a copy of the decision on the above.

S J Haigh

S J Haigh
for Solicitor to the Council

Enc

KIRKLEES M.C. HIGHWAYS SERVICES H. O. OLDGATE HOUSE 29 APR 1994		
REF No	ATT	FILE
	RD/SP	