

|  |
| --- |
| **Interim Order Decision** |
| Site visit made on 12 April 2022 |
| **by Alan Beckett BA MSc MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 30 May 2022** |

|  |
| --- |
| **Order Ref: ROW/3248883** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (‘the 1981 Act’) and is known as the Nottinghamshire County Council (East Stoke Footpath No. 7 and Elston Footpath Nos. 13-17) Modification Order 2015.
 |
| * The Order is dated 17 April 2015 and proposes to modify the Definitive Map and Statement for the area by adding six public footpaths as shown in the Order plan and described in the Order Schedule.
 |
| * There were 12 objections outstanding when Nottinghamshire County Council (‘the Council’) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.
 |
| **Summary of Decision: The Order is proposed for confirmation subject to the modifications set out in the Formal Decision.** |
|  |

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the Order routes on Tuesday 12 April 2022 viewing the claimed footpaths from public vantage points on Carrgate Lane, Cross Lane and Moor Lane.
2. The Council adopted a neutral stance in relation to the Order having been directed to make it by the Secretary of State following an appeal by the Notts Area Ramblers (‘the Applicant’) against the Council’s decision not to make an Order following its consideration of the application.
3. The case in support of the Order is based on historic documentary evidence with reliance being placed on the East Stoke and Elston Inclosure Award of 1801. The objectors pointed out that the applicants had not submitted a copy of the relevant Inclosure Act; consequently, it was not possible to determine whether the appropriate procedures had been followed in relation to the award or that the Commissioners had the relevant powers to set out public rights of way (*Cubbitt v Maxse* [1873] LR 8 CP 704).
4. I requested the Applicant to provide a copy of the 1795 Inclosure Act under which the 1801 Award was made; this document was circulated to the parties on receipt.

**Legal Framework**

1. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of events specified in Section 53(3)(c)(i) of that Act.
2. Section 53 (3) (c) (i) provides that a modification order shall be made where evidence is discovered which (when considered with all other relevant evidence available) shows that a public right of way which is not shown in the definitive map and statement (DM&S) subsists over land in the area to which the map relates.
3. Section 53 (3) (c) requires there to have been a ‘discovery’ of evidence for the provisions of the section to be engaged. That evidence has been discovered is not disputed in this case.
4. The evidence adduced in this case is documentary; no evidence of recent use of the Order routes by the public on foot had been submitted. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan, or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

The Main Issues

1. The main issues are therefore whether the evidence adduced is sufficient to show, on the balance of probabilities, that the claimed public footpaths subsist such that the definitive map and statement require modification.

Reasons

1. If the Order were confirmed without modification, the ways at issue would form a network of footpaths commencing on the fringes of Elston and running in a generally south-easterly and easterly direction over predominantly arable land towards and across the parish boundary with East Stoke.
2. Extracts from a number of documentary sources have been submitted including inclosure records from 1801, Ordnance Survey (‘OS’) maps of various dates and at various scales, Finance Act 1910 records and records relating to the preparation of the first definitive map and statement. The documentary sources submitted in evidence in relation to each of the paths at issue are by and large the same and to avoid repetition, I will consider the evidence for the routes together.

*East Stoke and Elston Inclosure Award 1801*

1. The award was made under the provisions of the 1795 Act “*for dividing and inclosing the open arable fields Meadows Pastures Commons and Waste grounds within the parishes of East Stoke and Elston in the County of Nottingham and for ascertaining the boundaries between the said Parishes*”.
2. The 1795 Act sets out the procedure by which public roads were to be set out, including the requirement for certification by the Surveyor and deposition of a certificate with the Quarter Sessions that the new roads had been set out and properly formed.
3. The Commissioners were also empowered to “*set out and appoint, or cause to be made, erected, and completed, such public Bridle Roads and Footways, and private Roads and Ways……as they shall think requisite…..and the same shall be made and erected, and at all Times hereafter repaired, cleansed, maintained and kept in Repair, either by a parochial Rate or assessment, or by such Persons, and in such manner as the said Commissioners shall in and by their Award, direct and appoint*”. There was no requirement for the Commissioners to have the public footpaths set out certified in the same manner as was required for public roads.
4. The Award sets out a public footway from Elston to East Stoke and then onwards to Thorpe. The part of this route in Elston is described as “*leading from the lower street of Elston at the south east end thereof in a southeastwardly direction over allotments herein made to Trustees of the poor of Southwell and Gainsborough, the trustees of the School of Elston, William Rippon James Penleaze John Brockton John Manby across the Broad Meadow Road and an allotment made to Robert Waring Darwin into the Parish of East Stoke*”.
5. The public footpath awarded is shown on the award plan by means of a broken line and can be traced through allotments being made to the named parties; the alignment shown broadly accords with footpath 13 as shown in the Order plan. The awarded footpath to the east of Cross Lane is shown on the award plan as running to the then parish boundary at a drain to the north of the River Devon.
6. In East Stoke the Award sets out a public footpath “*beginning at an allotment herein made to Sir George Bromley No. XLV thence in an Eastwardly direction over an Allotment made to Robert Waring Darwin No LI and an Allotment made to His Grace the Duke of Portland No LVIa to the Lordship of Thorpe*”.
7. The award plan shows this route to be a continuation of the route described in paragraphs 15 and 16 above; together, these award routes would have served as a continuous footpath between Elston and the Thorpe parish boundary. The awarded route east of the drain is shown as running directly to the parish boundary at a point a little to the south of Moor Lane and does not accord with the more circuitous route shown on the Order plan as footpath 14 and footpath 7.
8. A footpath which broadly corresponds with footpaths 16 and 17 is set out in the award as “*leading from the upper Street in Elston in an eastwardly direction between an ancient homestead marked 16 and a garden marked 17 in the said Map thence over an allotment herein made to Sir George Bromley No.XIV*”. The Award plan shows that this route commenced on Mill Road to the north of the property now known as Kindersley at a point approximately 100 metres south of the junction of footpath 16 with Mill Road shown on the Order plan.
9. The award also sets out a footway on the general alignment of claimed footpath 15 and is described as “*leading from an ancient stile at the east corner of an old inclosure called Gall Hall Close thence across allotments herein made to Richard Nowell Thomas Jackson John Fryer and Sir George Bromley to and across an old inclosure marked 10 in the said Map and thence over and across allotments made to the Trustees of the Poor of Southwell and Gainsborough George Wakefield Richard Jackson Thomas Jackson and William Bramley across the Broad Meadow Road to old inclosures belonging to William Parkin*.”
10. I am not persuaded by the objectors’ contention that the description of footpaths 13, 15, 16 and 17 are not clear. When the description of these paths in the award is read with reference to the award plan, the alignments of the routes are evident and, as noted above with the exception of footpaths 14, 7 and part of footpath 16, the alignments of the awarded paths generally coincide with the routes described in the Order.
11. The Commissioners state in the Award that it had been “*drawn up and executed as the said Act requires”* and that the *“Award should be final binding and conclusive unto and upon all parties and persons”* with an interest in the lands being divided and allotted. In the absence of evidence to the contrary, the Award stands as a record of what the Commissioners had done in setting out public footpaths in East Stoke and Elston as part of the re-organisation of the open fields being inclosed and can be accorded considerable evidential weight.

*Sanderson’s Map 20 Miles Round Mansfield (1835)*

1. Sanderson’s map shows the post-inclosure road network in the vicinity of the claimed footpaths with Cross Lane, Moor Lane and Carrgate Lane (*Cow Gate Lane* on Sanderson’s map) being shown on their current alignment. The course of the River Devon and of the land drain which formed the parish boundary between Elston and East Stoke are both shown as meandering watercourses prior to their subsequent straightening.
2. Moor Lane is shown as crossing the river by means of a bridge and running to Cotham; the footpath awarded in East Stoke terminated at the Thorpe parish boundary approximately 200 metres west of the bridge; I consider it highly likely that there was a means of onward travel to the bridge from the parish boundary which provided a means of travel of foot between Elston and Cotham.
3. The claimed footpaths are not shown on Sanderson’s map; the key to the map shows that turnpike and cross roads were being shown, but there is no indication that Sanderson intended to depict minor highways such a footpaths or bridleways. The absence of these footpaths from Sanderson’s map does not undermine the inclosure award evidence.

*Ordnance Survey (‘OS’) Mapping*

1. The 1884 25-inch to 1-mile map shows claimed footpaths 16 and 17 on the inclosure award alignment commencing on Mill Road to the north of the property now known as Kindersley, running over fields to make a connection with Carrgate Lane. Footpath 15 is shown commencing at the junction of Toad Lane and Carrgate Lane and running to Cross Lane with a ‘Foot Bridge’ being noted at the crossing of Carr Dyke. Footpath 13 is shown as commencing on Carrgate Lane and running south-easterly to Cross Lane with a ‘Foot Bridge’ being noted at the crossing of Carr Dyke. The 1884 map provides supporting evidence that the routes set out under the inclosure award almost a century earlier remained as observable features on the ground.
2. The map shows footpaths 14 and 7 on the general alignment described in the Order and not the inclosure award route. It is evident from this map that at some point between 1835 (the date of publication of Sanderson’s map) and 1884, the course of the drain which formed the Elston / East Stoke parish boundary and the course of the River Devon had been straightened. The Applicant contends that the awarded route is likely to have been re-aligned as part of this process in order for the public footpath to reach the new bridge over the river which now carries the continuation of Moor Lane (East Stoke bridleway 4).
3. The 1900 second edition 25 inch to 1 mile map depicts the footpaths by means of double peck lines with the crossing of Carr Dike on footpaths 13 and 15 being annotated ‘F.B’. Footpaths 14 and 7 are shown on the same alignment as the earlier 1884 map. Footpath 16 is shown on this map as commencing on Mill Road to the south of the junction with The Orchard and not to the north of Kindersley as was shown on the Award map and the 1884 OS map.
4. The 1921 6-inch to 1-mile map shows the footpaths on the same general alignments as the earlier 1884 map with a few notable variations. The map shows footpath 16 as commencing on Mill Lane at the same location as the 1900 25-inch map. Footpath 14 is shown as commencing on Cross Lane as shown in the Order plan and not part way along the access to Meadow Farm as was shown on the 1884 map.
5. Footpath 15 is not shown on the 1947 1-inch to 1-mile map; the remaining footpaths are shown on the general alignments shown in the order plan. The footpaths are shown by means of a single peck line.

*Finance Act 1910*

1. The 1900 second edition 25-inch map was used as the base map for the purposes of the Finance Act 1910 survey. On the plans annotated ‘working copy’, footpath 16 is annotated in red in as ‘*public*’, as is footpath 15. Footpath 13 is annotated ‘*public*’ and ‘*public path*’; footpath 14 is also annotated ‘*public path*’.
2. Footpath 13 is shown to run through hereditaments 62, 89, 52, 14 and 31. The valuation book notes that a reduction in site value of £15, £3, £5, £10, and £10 was allowed in these parcels due to public rights of way or user. A reduction in valuation of £7 was granted in respect of hereditament 20 crossed by footpath 14.
3. Footpath 15 crossed hereditaments 51, 14, 52, 36, 83, 62, 60 and 69 for which a reduction in site value respectively of £7, £10, £5, £50, £10, £15, £10, and £5 were granted. Hereditament 36 was also crossed by footpaths 16 and 17.
4. The Applicant has undertaken an assessment of each of the hereditaments for which a reduction in value was granted to estimate the impact upon those fields crossed by the claimed footpaths. Each hereditament comprises a number of individual fields and the hereditament as a whole was granted a reduction in value due to the impact on land values of the existence of a public right of way. Not all fields in each hereditament would have been impacted by the claimed footpaths, as the paths are shown to run through certain fields but not others.
5. Calculating the acreage of each field crossed by the paths at issue and using a standard formula for the assessment of a reduction in land value (6d per acre for 25 years), the applicants estimated reductions in value were lower than those granted by the valuer. Whilst there is some criticism of this exercise by the objectors, in 8 out of the 12 hereditaments for which a reduction in site value was granted, the only path or way shown by OS as crossing them were those described in the Order. The Applicant considers that the Finance Act documents are of high evidential value.

*Parish survey of public rights of way*

1. Elston Parish Council did not claim any of the footpaths at issue as part of the survey of public rights of way conducted under the provisions of the National Parks and Access to the Countryside Act 1949 (‘the 1949 Act’). The footpaths are however, marked X1 (footpath 15), X2 (footpaths 13 and 14) and X3 (footpaths 16 and 17) on the parish survey map.
2. In correspondence to the surveying authority dated 27 March 1953, the Chair wrote “*Those marked X, X1, X2, X3 have not, to our knowledge been in use for many years now. All indications (except on maps) have disappeared long ago, previous to my personal knowledge of the last 16 years. In two cases the plank bridges disappeared some years ago when this stream flooded the land here for a while in 1947 (March)*”. The Chair also noted that the paths seemed to have originated for the purpose of farm workers reaching their employment, and that in the case of X1 (footpath 15) that Council houses and a sewage treatment works had been built on the line of the path.

*Discussion*

1. The 1801 Inclosure Award provides conclusive evidence of the setting out of public footpaths within the area affected by the inclosure of the common fields within Elston and East Stoke. The Award is a record of the actions which the Commissioners had undertaken as part of the re-ordering of the post inclosure landscape and records the position of those public footpaths which the Commissioners considered requisite under the provisions of the 1795 Act. As such, I attach significant evidential weight to the Award with regard to the existence of public rights of way on foot.
2. The footpaths set out under the Award appear to have remained as observable features within the landscape until the mid-1940s as they were recorded on successive editions of OS maps, although the alignment of parts of the awarded routes appears to have changed with the passage of time. Notably, the western end of footpath 16 has moved to a more northerly position on Mill Road than was set out by the inclosure commissioners. No evidence for the formal diversion of the western end of the footpath has been submitted and the Applicant has submitted that the Order should be amended to record the path on the alignment set out at inclosure.
3. The alignment of the awarded footpath to the east of Cross Lane appears to have changed at some point between 1820 and 1884 as a result of the straightening of the course of the River Devon. The Applicant submits that no record of a diversion order has been found in the Quarter Sessions records and considers the later route to have been dedicated as a substitute for the route disturbed by the straightening of the river.
4. The route shown in the Order as footpaths 14 and 7 reflects the route shown in the 1921 OS map, and this alignment was one which the Chair of Elston parish council considered had fallen into disuse prior to 1947. Although the Quarter Sessions records are not said to record a formal diversion of the path, it may be that other statutory authority for that diversion may have been given in association with the canalisation of the parish boundary drain and the River Devon.
5. In any event, I consider it highly unlikely that there would be two rights of way in close proximity running over roughly the same fields eastwards from Cross Lane towards Cotham. The more probable explanation is that the routes shown by OS from 1884 onwards and for which a reduction in site value was granted under the Finance Act survey was the alignment which the awarded public footpath took following the straightening of the river. Although more circuitous than the awarded footpath, the later route maintains a junction with the current bridge over the river and would serve the same function as the path set out at inclosure.
6. The reductions in site value granted in relation to those hereditaments crossed by the footpaths at issue provides further supporting evidence of the reputation of the routes as being public in the early twentieth century. It is not known who added the red ink annotations to the working copies of the Finance Act plans. As working copies, the information contained within them was likely to be subject to revision before the record copy was published. Although less weight can be given to the red ink annotations, the inference as to the public status of the paths is reflected in the reduction in site value of those hereditaments crossed by them. The red ink annotations therefore provide some evidence of the reputation which the routes at issue had as public rights of way at the time of the valuation.
7. Whilst the depiction of the footpaths on OS maps does not provide evidence of the existence of public rights on the routes shown, the fact that successive maps up to 1947 depict the paths indicates that they remained as observable features on the ground through the nineteenth and early twentieth centuries.
8. The objectors point to there being no recent evidence of use of the claimed routes by the public and that the western end of footpath 15 has been built over (by housing and a sewage works) as evidence that the claimed routes are not public rights of way. However, both these developments appear to post-date 1947 as they are not shown on the OS map of that date. The relatively recent development of the land does not prevent or preclude footpath 15 from having subsisted as a public right of way under the provisions of the inclosure award prior to the development of the land.
9. It is acknowledged that there is no recent evidence of use by the public of the footpaths at issue. The March 1953 correspondence from the Chair of Elston parish council demonstrates that when parish survey under the 1949 Act was conducted, the footpaths had been unused for some time. The letter suggests however that it would have been possible to use footpaths 13 and 15 prior to the footbridges recorded in successive OS maps being washed away in early 1947. Although the Chair considered that these routes originated as agricultural workers paths, the Inclosure Award provides evidence of the paths’ true origins.
10. I am satisfied that the Inclosure Commissioners had the relevant authority under the 1795 Act to set out public footpaths as part of the inclosure process, and that the footpaths at issue were described in the 1801 Award. Whilst there is no evidence of a formal diversion of the western end of footpath 16, it is more probable than not that footpaths 14 and 7 east of Cross Lane were re-aligned in conjunction with the canalisation of the river and drain to retain a means of access to Cotham via the new bridge.

**Conclusion**

1. I conclude that the evidence adduced is sufficient to demonstrate that public rights on way subsist over parts of the routes shown in the Order. As noted above, the western end of footpath 16 does not accord with the inclosure award evidence; I propose to modify the Order accordingly.
2. Having regard to these and all other matters raised in the written representations I conclude that the Order should be proposed for confirmation with modifications.

 **Formal Decision**

1. I propose to confirm the Order subject to the following modifications:

in the Schedule, Part I, in the entry for Elston Footpath 16: delete the grid reference ‘76104778’ and insert ‘76104767’;

in the Schedule, Part II, in the entry for Elston Footpath 16: delete the grid reference ‘76104778’ and insert ‘76104767’;

in the Order map, amend the line to be recorded as Elston Footpath 16 to show it commencing at a junction with Mill Road north of the property known as Kindersley and running in a generally easterly direction.

1. Since the Order as proposed to be confirmed would affect land not affected by the Order as submitted and would not show a way shown in the Order as drafted, I am required by virtue of Paragraph 8 (2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Alan Beckett

Inspector

