



## Order Decision

Unaccompanied site visit made on 27 July 2015

**by Mark Yates BA(Hons) MIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 24 August 2015**

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### **Order Ref: FPS/L3055/7/78**

- 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 (Fiskerton cum Morton Footpath Nos. 5 and 7 and Bridleway No. 6) Modification Order 2010.
- The Order was made by The Nottinghamshire County Council ("the Council") on 8 January 2010. The outstanding issues to be determined relate to the addition of two sections of footpath to the definitive map and statement, as detailed in the relevant part of the Order Map and Schedule.
- There was one objection and one representation outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

**Summary of Decision: The Order is confirmed.**

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### **Procedural Matters**

1. The Council gave notice to the Secretary of State, in accordance with paragraph 5 of Schedule 15 to the 1981 Act, for the Order to be treated as two separate Orders. It was the Council's intention to confirm the Order for Footpath No. 7 and Bridleway No. 6 as there were no outstanding objections or representations to the addition of these routes to the definitive map<sup>1</sup>. Therefore, the Order submitted to the Secretary of State only relates to the addition of two sections of Footpath No.5 to the definitive map.
2. The objector (Mr Koschetz) says that he has been placed at a disadvantage due to the closure of the Nottingham Archives until the spring of 2015. He also refers to a lack of cooperation from particular parties such as the Council and Fiskerton cum Morton Parish Council. Any complaint that Mr Koschetz has in respect of the second issue should be pursued with the parties concerned.
3. In relation to the closure of the Archives office for a period of time, Mr Koschetz did not request an extension to the deadline set for the exchange of the written representations. I note that Mr Koschetz says that he has previously visited the Archives Office and a number of documents have been submitted in support of his case, including extracts from the inclosure award. He was also informed that the documents relied upon by the Council should be available at the Council's Offices. It is not apparent what additional documentation he considers to be material to the determination of the Order. On the basis of the information supplied, I am unable to conclude that Mr Koschetz has been prejudiced in researching and presenting his case.

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<sup>1</sup> This order was subsequently confirmed by the Council on 3 October 2014

## **Main Issues**

4. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence shows that a right of way which is not shown in the map and statement subsists. The burden of proof to be applied is the balance of probabilities. In considering this test, I shall consider whether the evidence is sufficient to infer the dedication of a public right of way at common law.

## **Reasons**

### ***Background***

5. The Order proposes to add two sections of footpath to the definitive map which would become part of Footpath No. 5. Presently, Footpath No. 5 does not link with a recorded highway at either end and the two sections of path included in the Order would provide a means of access to the highway network.
6. The first section ("the southern section") continues along Moor Lane and crosses over a watercourse and railway line to terminate at the junction with Footpath No.7. In respect of the second section ("the northern section"), this proceeds along a proportion of Middlefield Road<sup>2</sup> to terminate at Causeway Lane.

### ***The documentary evidence***

7. The 1842 map with the Fiskerton Inclosure Award<sup>3</sup> shows Moor Lane on its original alignment, prior to the construction of the railway line referred to below. It is uncoloured and numbered 540. In contrast, Middlefield Road is coloured yellow and unnumbered. A route is depicted continuing to the south of Moor lane in the locality of Footpath No. 7. Another route is shown proceeding across old inclosures between Moor Lane and Middlefield Road. The Council draws a comparison with two other routes shown through old inclosures on this map which are now recorded as public footpaths.
8. Moor Lane is listed in the inclosure award under the category of "*old public roads*". In contrast, Middlefield Road is set out in the award as a "*Private Carriage Drift and Occupation Road*" for the use of the owners of specific parcels. The Council asserts that Middlefield Road and the connecting route across the old inclosures are likely to pre-date the award. Reference is also made to the southern and northern sections linking with awarded ways to other villages.
9. On the basis of the information provided, it appears to me that Moor Lane was considered to be an old public road and this could be supportive of the existence of public vehicular rights. The other relevant routes may well have pre-dated the inclosure award. However, Middlefield Road is clearly described as a private road for the benefit of particular parties. Whilst lesser public rights could exist over the road, this would need to be determined from the remainder of the evidence. Nor can it be determined that public rights were considered to exist over the connecting route shown through the old inclosures. Further, I am not satisfied that the Council has substantiated to any reasonable

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<sup>2</sup> Referred to in some of the documents as Middle Field Road

<sup>3</sup> Details provided by Mr Koschetz indicate that the inclosure award originates from 1841

- degree the proposition that the two sections were used by the public to access awarded highways to other villages.
10. The Fiskerton tithe map of 1842 shows Middlefield Road coloured in the same manner as the connecting highways at its eastern end and outside of the land subject to taxation. Its depiction in this manner could be supportive of the existence of public rights. However, private roads as well as public roads could be excluded from the payment of tithes. In particular, this tithe map was produced around the time of the inclosure award, which described Middlefield Road as a private road for the benefit of certain parties.
  11. The Morton tithe map of 1846 shows Middlefield Road in the same way as the Fiskerton tithe map. Moor Lane is also shown coloured and excluded from the surrounding taxable parcels of land. However, my comment above regarding the depiction of a route in this manner is applicable. It is apparent that Moor Lane had been re-aligned slightly in light of the construction of the Nottingham and Lincoln Railway. I do not find the copy of the tithe map to be particularly clear but it appears to depict sections of path to the north and south of Moor Lane. The Council refers to annotation which appears to be supportive of the route being a footpath. Whilst no direct link is shown over the railway or adjacent watercourse, the Council draws a comparison to this issue arising elsewhere with a public footpath.
  12. A pecked line is shown leading out of Moor Lane to the south (within parcel 30) on a plan of 1844 in connection with the proposed Nottingham and Lincoln Railway. Another route is shown continuing from Moor Lane to the north (within parcel 25). In the accompanying book of reference, parcels 25 and 30 are both stated to contain a footpath. The Council draws attention to a public footpath which is also listed in this document as a footpath. Moor Lane is described in the book of reference as an occupation road.
  13. The railway documents could be supportive of a public footpath continuing to the north and south of Moor Lane. This lane was only described as an occupation lane in the book of reference which conflicts with the inclosure award evidence. Nonetheless, the two sections of footpath were accessed via Moor Lane.
  14. The 25 inch Ordnance Survey ("OS") map of 1885 shows a route continuing to the north and south of Moor Lane by way of pecked and solid lines. This route is specifically shown crossing the railway line and watercourse to provide a link between Footpath No. 7 and Moor Lane. The route continues through to Middlefield Road where it is shown terminating at a bend in the road.
  15. A through route is also shown on the 25 inch OS map of 1919. In addition, there is the annotation "FB", to denote a footbridge, shown at the crossing of the watercourse immediately to the south of Moor Lane. The section between Moor Lane and Middlefield Road differs from the original alignment and corresponds more closely to the route of Footpath No. 5 subsequently recorded on the definitive map.
  16. The OS maps serve as a reliable indication of the features present on the date of the relevant survey but they provide no confirmation regarding the status of any tracks or paths shown. In this case, the OS maps are supportive of the existence of a through route from Footpath No. 7 which continued to Middlefield Road via Moor Lane. The "FB" annotation would indicate that the crossing of the watercourse was suitable for pedestrians.

17. A map produced in relation to the 1910 Finance Act shows Moor Lane within the numbered parcels, known as hereditaments. In contrast, Middlefield Road is shown excluded from the surrounding hereditaments which can be a good indication of the existence of highway rights. Whilst the Council considers the map to be untrustworthy in its depiction of Moor Lane in light of the inclosure award evidence, the same would be applicable in relation to the exclusion of Middlefield Road from the surrounding hereditaments. Mr Koschetz refers to a deduction for public rights of way or user contained in the valuation book in respect of this Act for hereditament 174, which includes the land crossed by Footpath No. 5. However, it cannot be determined whether the deduction related to this path. Overall, I am not convinced that any significant reliance can be placed on the Finance Act evidence.
18. Mr Koschetz has provided a 6 inch to the mile map of 1916 showing the location of glebe land at the time but this issue has no direct bearing on the southern or northern sections. It only shows that a section of Footpath No. 5 went through glebe land.
19. Schedules were compiled on behalf of the parish council during the initial stage of the compilation of the original definitive map. An unsigned schedule, dated 7 September 1952, was completed in respect of Footpath No. 5<sup>4</sup>. This path is described as starting at "*Moor Lane Morton*" and finishing at "*Tenpenny Style [sic] (Middlefield Lane)*". The route of the path is further described as "*Style on south OS 122 across footbridge and over Tenpenny Style into Middlefield Lane*". It is stated that the reason for believing the way to be public was use over a significant period of time. The route of Footpath No. 5 is clearly shown on the accompanying map proceeding between Moor Lane and Middlefield Road.
20. Mr Koschetz suggests that those working on the parish claims may have had a vested interest in relation to their land and he appears to question the process that was undertaken. However, it is not my role to determine whether Footpath No. 5 was correctly placed on the definitive map. Clearly, it was considered by the relevant local authorities to be a public right of way and this was endorsed by its subsequent inclusion on the draft, provisional and definitive maps.
21. Mr Koschetz has provided information in relation to land known as tenpenny stile. Extracts have been provided from a document where this name appears in respect of parcels 189 and 199. A map stated to be a copy of a tithe map shows parcels 189 and 199 corresponding to parcels 109 and 122 respectively on the 1919 OS map. There is a further reference to tenpenny stile in a conveyance of 1946 where it is specified as corresponding to OS parcel 109. This parcel was located adjacent to the bend in Middlefield Road.
22. The above could raise some doubt regarding the claimed termination point for Footpath No. 5 at the time of the parish survey. However, the schedule only describes the path in relation to parcel 122. It is then described crossing into Middlefield Road. The schedule map shows Footpath No. 5 proceeding solely within parcel 122 and terminating at the junction with Middlefield Road.
23. No claim was made for the southern or northern sections included in the Order but the Council refers to locations where the parish council claimed a way only so far as a lane. I accept that an inference can be drawn from the schedule

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<sup>4</sup> Originally known as Footpath No. 4

form and map that the long-term use by the public continued along sections of Moor Lane and Middlefield Road.

24. An Order was made and confirmed in 1978 by the Council to divert Footpath No. 5. The Council refers to the description of the path to be diverted as being part of Footpath No.5. However, I am not satisfied that any meaningful conclusion can be drawn from this reference by itself given the alignment shown on the definitive map. Nor can the degree of public use be determined from the diversion of the path for the benefit of the landowner. What is interesting is that a section of the path stopped up extended over Moor Lane and beyond the footpath shown on the definitive map.

### ***Evidence of use***

25. Four people have provided evidence of personal use which generally spans a number of years. The representation from Mrs Cook is supportive of the acknowledgment of longstanding public use of Middlefield Road. Her evidence is supported by the submission from her husband. The Council also refers to the depiction of a worn path over Moor Lane on the OS base maps used in connection with the 1978 Order and a Land Registry plan of 6 October 2009.
26. Mr Koschetz states that he has challenged people from 1995 onwards and it is apparent that a gate or gates were in place for a period of time. He also says that he has erected signs and photographs indicate that the signage was worded "*Private No Public Right of Way*". This action appears to have been undertaken in connection with the northern section and is supported by the evidence of the users outlined above. Although such action could be sufficient to indicate a lack of intention by a landowner to dedicate a way, the evidence on the whole pre-dates the challenges made by Mr Koschetz. A further issue arises in that the Land Registry details indicate that his title does not encompass Middlefield Road.
27. The user evidence is not of such quality by itself to infer the dedication of a public right of way but it is supportive of people continuing along the southern and northern sections. I give particular weight to the evidence from Mr and Mrs Cook given their longstanding knowledge of the area and occupation of a property adjacent to Middlefield Road. The challenges mentioned by Mr Koschetz also suggest that the public have continued along the southern and northern sections.
28. Structures have been put in place to facilitate the crossing of particular features, including the railway line and watercourse. There are signs on the railway crossing stating "*Stop Look Listen Beware of Trains*". This suggests an acknowledgment by Network Rail that the public are continuing at this point. There is also evidence that the Council erected a sign stating "*Public Footpath to Morton*" on Middlefield Road at the entrance to Footpath No. 5. The provision of structures and signs on both sections is likely to have served to facilitate and encourage people to use the entire route irrespective of who erected and maintained them.

### ***Conclusions***

29. The documentary evidence shows that Middlefield Road and Moor Lane are features of some antiquity, dating back to at least the 1840s. A route between these two features is depicted on the inclosure award map and other subsequent plans. The award is also supportive of Moor Lane being viewed as

an ancient highway. Railway documents and OS maps point to a footpath proceeding from the present junction with Footpath No. 7 and continuing via Moor Lane through to Middlefield Road and a proportion of this route was subsequently added to the definitive map. There is some more recent evidence in support of public use of the two sections and I give particular weight to the statements of Mr and Mrs Cook.

30. I do not find the evidence in support to be compelling. However, I consider on balance that it is supportive of the existence of a historical through route which has been used by the public. The only challenges to this use arising from the relatively recent actions of Mr Koschetz. I recognise that the alignment of Footpath No. 5 has changed during the course of the twentieth century but the use since 1978 is likely to have continued over the southern and northern sections included in the Order. Whilst there is some evidence in support of higher public rights existing over Moor Lane, I am not satisfied that it is of such weight to show that a vehicular highway subsists.
31. For these reasons I conclude on the balance of probabilities that a public footpath subsists over the southern and northern sections included in the Order.

### **Other Matters**

32. Mr Koschetz raises a number of issues which in my view have no bearing on the determination of whether a right of way subsists. Therefore, I have not considered it necessary to address these matters in the decision.
33. I note that there is a reference in the entry for Footpath No. 5 in the definitive statement to an inclosure award. This reference appears to be incorrect in light of the information supplied. However, this matter is not material to the determination of the status of the northern and southern sections included in the Order.

### **Overall Conclusion**

34. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed.

### **Formal Decision**

35. I confirm the Order.

*Mark Yates*

**Inspector**