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## Order Decision

Site visit made on 25 August 2015

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 19 October 2015**

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### **Order Ref: FPS/L3055/7/89**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Nottinghamshire County Council (Tuxford Bridleway No.8 and Byway No.12 and West Markham Footpath Nos.8 and 9, Bridleway No.10 and Byway Nos.11 and 12) Modification Order 2005.
- The Order is dated 14 October 2005 and proposes to modify the Definitive Map and Statement for the area by adding two footpaths, a bridleway and three byways open to all traffic, and upgrading two lengths of footpath to bridleway as shown in the Order plan and described in the Order Schedule.
- There were 6 objections outstanding when Nottinghamshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision**

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### **Procedural Matters**

1. This case concerns a network of routes lying to the south-west of West Markham village providing links with the villages of Milton to the north-north-west, Tuxford to the east, Walesby to the south-west, and Kirton to the south-south-west. The claimed routes are:
  - a Byway Open to All Traffic ('Byway'), between South Hills Farm, Bevercotes Road and the C87 Milton to Walesby Road, comprising Tuxford Byway 12 and West Markham Byway 11, forming a generally east-west route (marked as Back Lane (to the east) and Leys Lane (to the west) on the Order plan) - for ease, I shall refer to this as Route A
  - a Byway between Bacon Lane, West Markham and the junction of Back Lane and Leys Lane, comprising West Markham Byway 12, forming a generally north-south route - for ease, I shall refer to this as Route B
  - a Bridleway from West Markham Byway 11 (Back Lane) to the A6075 Ollerton Road, comprising West Markham Bridleway 10 and Tuxford Bridleway 8 (the latter section formed by the upgrading of Tuxford Footpath 8 and part of West Markham Footpath 7), forming a generally north-south route - for ease, I shall refer to this as Route C
  - a footpath between the C87 Milton to Walesby Road and West Markham Bridleway 10, comprising West Markham Footpaths 8 and 9, forming a generally north-south route - for ease, I shall refer to this as Route D

2. The Order results from applications made by The Ramblers' Association Nottingham Area ('The Ramblers') for the addition of rights of way to the Definitive Map and Statement ('DMS'). The case relies on the interpretation of historical documentary evidence.
3. I note that the Order refers to the upgrading of a short section of West Markham Footpath 7 to bridleway, in total 1.5 metres at the junction between existing Tuxford Footpath 8 (proposed to be upgraded to bridleway) and proposed West Markham Bridleway 10. This is described at the end of Part I of the Schedule to the Order, the modification of the Definitive Map. However, there is no reference to this in the Order title, in Part II of the Schedule, the modification of the Definitive Statement, and neither the descriptions of Tuxford Bridleway 8 or West Markham Bridleway 10 include this additional length. Neither does the Order plan refer to West Markham Bridleway 7. It seems to me that this is an oversight. However, this has not been raised by the parties, suggesting to me that no prejudice arises. Nevertheless, I consider that the oversight can be amended, if the Order is confirmed, by modifications to refer to the 'missing' section of path.
4. The Council seeks that Route C (proposed West Markham Bridleway 10 and Tuxford Bridleway 8) be modified so as to record Byways. I consider this below.
5. In addition, it is requested that the word "minimum" be deleted from the Schedule to the Order wherever it appears. It has been used in relation to the width of the routes recorded. Reference to a minimum width for a right of way in an Order can lead to uncertainty as regards future management and enforcement matters. I therefore consider it appropriate that the Order be modified accordingly if it is confirmed.
6. One of the objections submitted to the Council has since been withdrawn in writing<sup>1</sup>.
7. Both parties refer to the *Andrews [1993]*<sup>2</sup> judgement in their submissions. However, this has since been superseded by the *Andrews [2015]*<sup>3</sup> judgement. I therefore invited the parties to comment on the latest judgement, and in reaching my decision I have taken into account the comments received.
8. I visited the Order routes accompanied by Neil Lewis, a representative of Nottinghamshire County Council ('the Council'), Chris Thompson, representing The Ramblers', and John Clough, one of the landowners objecting to the Order.

### **The Main Issues**

9. The Order has been made by the Council under Sections 53(3)(c)(i) and (3)(c)(ii) of the Wildlife and Countryside Act 1981 ('the 1981 Act'). I must consider whether, on a balance of probability, the evidence discovered, when considered with all other relevant evidence available is, as regards Section 53(3)(c)(i), sufficient to show the footpaths, bridleway and byways referred to above which are not shown in the DMS subsist; and, as regards Section 53(3)(c)(ii), that existing footpaths ought to be shown as bridleways, and that the DMS require modification.

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<sup>1</sup> The objection made by Councillor J Ogle

<sup>2</sup> R v Secretary of State for the Environment ex parte Andrews [1993] QBD

<sup>3</sup> John Andrews v Secretary of State for Environment, Food and Rural Affairs [2015] EWCA Civ 669

10. Should I decide that public vehicular rights subsist over any of the routes, I shall take into account the effect of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act'). The 2006 Act extinguished public rights for mechanically propelled vehicles ('MPVs'), unless preserved by one or more of the exceptions set out in Section 67 of the Act.

## Reasons

### **Route A (Tuxford Byway 12 and West Markham Byway 11 (Back Lane and Leys Lane))**

#### *Early map*

11. Teal's late 18<sup>th</sup> century estate map<sup>4</sup> is the earliest document provided. However, I find it difficult to interpret - the map extracts have crossings out and what appear to be various later annotations. A route coinciding with Back Lane (Tuxford Byway 12 Tuxford and West Markham Byway 11 (part)) and an annotation at its western end 'From Milton' are marked. Although whether in its entirety what is shown forms part of the original mapping or a combination with later annotations cannot, in my view, be established from the photocopy provided.
12. The Council presumes, however, that as the north-south route, annotated 'From Retford', is a known public road and is shown in the same way as Route A then Route A was part of a longer public carriage road linking Tuxford and Milton. However, the map has no key and was produced to show lands held by an individual rather than to show public rights of way. Whilst the annotation 'to' or 'from' a named village or town may suggest public rights, in my view this cannot be extrapolated as evidence that public carriageway rights existed over Route A (if shown) when the map was drawn up.

#### *Inclosure Records*

13. Inclosure documents can provide conclusive evidence of the legal status of the highways described. The Council says the 1799 Tuxford Inclosure Act enabled the Commissioners to set out and appoint public bridle roads and footways through the old inclosures as well as the land to be enclosed. The 1804 Tuxford Inclosure Award sets out, "*One other Public Bridle Drift Way or Road and private Carriage Road for the use of the owners and occupiers of Lands in Tuxford West Markham and Bevercoats of the breadth of Twenty seven feet ... branching out of the London Road ... and running in a Westwardly direction along an ancient Lane and over a small part of the North Field certain old Inclosures the Common called the Moor and the Common called the West Wood to an allotment awarded to the proprietors of Estates and Common rights in West Markham and Milnton and over the said Allotment to the end of an ancient Lane in the parish of West Markham called Westwood Lane which we hereby distinguish by the name of West Markham Road*".
14. The Award therefore describes a route extending beyond the Tuxford Parish boundary into West Markham Parish. I have seen no evidence that the Commissioners had authority to award a route outside the Parish of Tuxford. This longer route is, however, shown on the Inclosure Map, along with a short section of what appears to be Leys Lane to the west. However, I believe the Council has mistaken the location of Westwood Lane in its submission. Rather

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<sup>4</sup> Plan showing Samuel Twentyman's Estate, surveyed 1776 and 1784

- than being part of proposed West Markham Byway 11, which is named together with Tuxford Byway 12 along its length as West Markham Road on the Inclosure Map, I consider it more likely to be a reference to Route B (see below). Nevertheless, I agree the reference to an "ancient lane" from the London Road suggests the awarded route, at least in part, followed the course of an existing route. In addition, the description of its continuation indicates that, in part, it crossed old inclosures.
15. In the belief that the awarded route formed part of a (pre-existing) carriage road linking Tuxford with West Markham and Milton, the Council says its use by the public with vehicular and all other types of traffic would have continued following inclosure; the owners and occupiers of land in Tuxford, West Markham and Bevercotes could have comprised the entire population of these parishes; and that 'private' could refer to the way in which the awarded road was to be maintained<sup>5</sup>.
16. I do not share the Council's view. For the reasons already given, I do not consider the Teal map demonstrates the pre-existence of a public carriageway. Furthermore, the Award set out a public bridle road, and a private carriage road for the use of owners and occupiers of land in Tuxford, West Markham and Bevercotes. It does not follow, in my view, that such persons were necessarily the population of the three parishes, but rather those with land the route (described as a whole) served to access. The term 'private carriage road' is distinct from a 'public carriage road' over which the public enjoy a right to pass with vehicles, and does not of itself confer or infer a public right to pass with vehicles. The public carriage roads are referred to in the Award before reference to the private roads and public bridle roads, further supporting the view they were different categories of way. Maintenance of the awarded route was to be at the expense of owners and occupiers of land in Tuxford.
17. The Tuxford Award also refers to the 'Herbage of the Roads', or grass crop, which was vested with the Surveyor of Highways<sup>6</sup> to raise money for the repair of the public and private roads within the parish. The Council concludes that as West Markham Road in Tuxford was subject to "lane letting" it was regarded as a minor parish and therefore public, carriage road, as by analogy, was the rest of the road. I disagree since the Award distinguishes between public carriage and public bridle roads. It does not follow that all roads that were let for their grass were public carriage roads: some, like part of Route A, by reference to the Award, were public bridle roads.
18. The West Markham Inclosure Award of 1808 describes "*One other public bridle and private carriage and drift road of the width of 30 feet called Leys Road from the west end of Leys Lane over Leys Common to the East end of Sour Sike Lane*". The Council says the West Markham Inclosure Act<sup>7</sup> contains no

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<sup>5</sup> The Award states, "All which said public Highways and Roads and private Carriage Roads and Footways both public and private herein before described ... shall be for ever maintained and kept in repair by and at the expense of the Inhabitants and Occupiers of Lands and Estates in Tuxford aforesaid ... in like manner as the public roads are or ought by Law to be maintained and repaired save and except so much of the several Roads called West Markham Road Kirton Road ... as extend over the Allotment to the Owners and Proprietors of Cattle Gates and Common rights in West Markham and Milnton aforesaid which we hereby declare shall be formed and made and forever thereafter maintained and kept in repair by and at the Expense [words indistinguishable on extract provided] mentioned Owners and Occupiers..."

<sup>6</sup> The Award states, "...all the Grass and Herbage growing arising and renewing upon the public Highways and public Bridle Roads in the parish of Tuxford ...(Except of such parts thereof as pass over the Allotments herein awarded to the owners of Common rights in West Markham and Milnton...) shall... be vested in the Surveyor or Surveyors ...of the Highways..."

<sup>7</sup> Whilst extracts from the various Awards have been provided, I have not seen full copies of the Awards or Acts

specific reference to the setting out of public bridle roads, so the Commissioners were acting in accordance with the 1801 Inclosure Consolidation Act<sup>8</sup>. In the *Andrews 2015* judgement references to bridleways and footpaths are construed as meaning public.

19. The Objectors say that as West Markham Byway 11 was set out only as far as the east end of Sour Sike Lane, and not to the (C87) Milton Road, doubt is cast on its status and purpose. They say it was an occupation road giving access to College Field, and was never laid out at the awarded 30 feet. However, there would have been no need to award and set out Sour Sike Lane or Leys Lane if they already existed prior to, and did not form part of, the land yet to be enclosed under the Inclosure Award. I agree with the Council that the documents point to Leys Road forming a link between two pre-existing ways across land to be inclosed as part of the process.
20. I note on the Inclosure Map the eastern end of Route A is annotated 'To Tuxford'. But, as with the Teal map (paragraph 12), this suggests public rights but does not necessarily mean public carriageway rights: the annotation is not inconsistent with the existence of public bridleway rights.

#### *Tithe Record*

21. The Bevercotes Tithe Map of 1848 shows the western end of Route A, Sour Sikes Road, and the section awarded as Leys Road in 1808. It is coloured brown in the same manner as the main road to which it connects, and annotated 'To West Markham' at its eastern end. Again, the annotation suggests public rights, however, with no key provided to indicate what the colouring represents, I do not consider it demonstrates that Route A carried public vehicular rights as the Council implies; although it remains possible.

#### *Later maps and plans*

22. Ellis's Map of 1825 shows Route A as a 'Cross Road'. Its key states Bridle Roads are shown 'B.R.' and Private Roads as 'P.R' which suggests that the map maker considered it to be neither of these categories. Sanderson's 1835 Map similarly shows it as a 'Cross Road', although the key to this map does not distinguish bridleways as a category of way. Sanderson's 1843 Map shows route A as a 'Cross Road' coloured brown in the same manner as other public roads, suggesting, the Council says, it had the same status and was of similar importance in the local road network. It has not been stated whether any of these maps were produced as a result of original surveys, or relied on the work of other map makers.
23. The OS 6" map of 1887 shows Route A with bench marks, spot heights, and Guide Posts, one at its western end with the road to Milton, and one where it meets Route B. Whilst guide posts suggest a need to identify destinations for users, I have seen no evidence that they are indicative of a public vehicular way.

#### *Finance Act Map*

24. The 1910 Act provided for the levying of a tax on the incremental value of land. In calculating the 'assessable site value' of land it allowed for deductions to cover such things as public rights of way and easements, should the land be

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<sup>8</sup> Section 10

sold. These were reflected in the records either by references to public rights of way in the documents forming the valuation process, or the exclusion of a route from assessable land parcels or hereditaments marked on an OS base map. Where a route shown on the OS base map is both uncoloured and unnumbered, and excluded from the hereditaments, there is a strong possibility that it was a public highway, normally but not necessarily vehicular.

25. The whole of Route A is excluded from the adjoining land parcels. Relying on the judgement in *Agombar*<sup>9</sup>, the Council says the only possible interpretation is that it was a public carriage road. However, recording public rights of way was not the primary purpose of the valuation exercise, and there may be other reasons for exclusion, for example where a private or accommodation road provided access to a number of landholdings in different ownerships, and where its ownership is not assigned to any individual. This would not be inconsistent with that part of Route A set out in the Tuxford Inclosure Award whereby use was described for owners and occupiers of land in Tuxford, West Markham and Bevercotes. However, it is also possible that the route awarded as a public bridle road in the early 19<sup>th</sup> century could, over subsequent years, have acquired higher rights. Accordingly, the exclusion of much of Route A from numbered hereditaments is not inconsistent with the possible existence of public vehicular rights.

#### *Other evidence*

26. West Markham Road is listed in the 1825 Tuxford Vestry Book amongst the lanes let. A record of roads and highways in the Parish of Tuxford dated 1839 (excluding occupation roads) also lists West Markham Road ('or Poor House Lane'), although there is no other reference in the documentary evidence to Route A being known by the latter name. The West Markham Highway Surveyor's Account Book of roads let from Lady Day 1839 to Lady Day 1840 includes 'Wood Lane & Ley Lane' and 'Soursike & Leys Roads', equating I believe to Route A between its western terminus and its junction with route C. Further lane letting records for Tuxford dated 1858, 1865, 1869 and 1892 refer to Bevercotes Road which the Council takes to be West Markham Road<sup>10</sup>; and for 1868, 1879 and 1881 for Leys Lane. However, for the reasons given above (paragraph 17), I do not consider these records are evidence that Route A was necessarily a public carriageway. Furthermore, how much of Route A was let is unclear.
27. An 1861 Auction Catalogue includes land on the north side of Route A between Route C and the Tuxford Parish boundary, showing a route coloured brown and annotated 'from Bevercotes' to the west and 'to Tuxford' to the east. Again, this suggests public rights. However, such a document is more likely to have been concerned with private rather than with public rights.

#### *Conclusions on the evidence*

28. I find that the Teal map at best shows parts of the eastern end of Route A existed prior to the enclosure of Westwood Common and that it was possible to pass to and from the direction of Milton, although no conclusions can be drawn as to what rights may have existed. I place significant weight on the setting out of a public bridleway in the Inclosure Awards of much of Route A. Also of

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<sup>9</sup> *Robinson Webster (Holdings) Ltd v Agombar* [2001] EWHC 510

<sup>10</sup> East of Route A the road is named 'Bevercotes Road' on the Order plan

significance are the references to pre-existing routes to which it connected, notably the description in the Tuxford Award which provides evidence of the reputation of its continuation as a public route into West Markham Parish. The Tithe Map extract adds nothing further.

29. Route A's exclusion from the Finance Act Map is strongly suggestive of public highway rights. Had the route been a bridleway at that time then it is likely it would have been included within the hereditaments, with a deduction claimed. However, part of the route set out in Tuxford suggests the need for private access to many different landholdings. The later maps and plans, however, are inconclusive, as are the lane letting records which could indicate either a bridleway or a vehicular way.
30. As a whole, I find the evidence is finely balanced. However, I conclude, on a balance of probability that public bridleway rights subsist, with the Inclosure records attracting the greatest evidential weight in this case. But, I find that the available evidence when considered as a whole falls short of tipping the balance in favour of a conclusion that public vehicular rights subsist. Accordingly, it is not necessary for me to consider the effect of the 2006 Act.

### **Route B (West Markham Byway 12)**

#### *Early map*

31. Teal's map (paragraph 11) does not show Route B. Nevertheless, the Council believes it is part of a road between Tuxford and Milton as it labelled 'From Milton'. This annotation is the only indication on the map of a destination, beyond what is the junction of Route A with Route C. Even if it can be interpreted as suggesting a route to and from Milton, neither its alignment nor any rights it enjoyed is evident from this map.

#### *Inclosure Records*

32. The 1804 Tuxford Inclosure Award refers (in setting out West Markham Road, part of Route A) to "... *an ancient Lane in the parish of West Markham called Westwood Lane...*". Westwood Lane corresponds with Route B and, by virtue of the wording, must have existed prior to that Award.
33. The 1808 West Markham Inclosure Award describes, "*One public bridle and private carriage and drift road of the width of thirty feet called Westwood Road from ... West Markham in its former course to the southwardly corner of Great South Hill field*". As above, a copy of the Inclosure Act has not been provided, but the Council says it contains no specific reference to the setting out of public bridle roads, so the Commissioners were acting in accordance with the 1801 Inclosure Consolidation Act<sup>11</sup>. In the *Andrews 2015* judgement references to bridleways and footpaths are construed as meaning public.
34. I agree with the Council that reference to "in its former course" in the West Markham Award indicates a pre-existing route, and this is consistent with the Tuxford Award. However, the Council argues again (paragraph 15) that as a pre-existing carriage road, the word 'private' must have been concerned with maintenance rather than status.

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<sup>11</sup> Section 10

35. The West Markham Award does not specify any particular users for Route B, neither do the extracts provided refer to maintenance, although the Council says the Award states the public bridle and private carriage roads were to be maintained in the same manner as the public highways. Route B was set out as a public bridle road (and private carriage road), not as a public carriageway. That it was to be maintained in the same way as other public highways does not necessarily mean, in my view, that it was a public vehicular highway.

#### *Tithe Record*

36. As the 1848 Bevercotes Tithe Map shows part of Route A annotated 'To West Markham', the Council says this is further evidence that Route B formed part of the local network of minor roads. The annotation suggests public rights, but whilst it may have been possible to reach West Markham via Routes A and B, the Map provides no evidence as to the status of the route shown, or that of its continuation, which is not shown.

#### *Later maps and plans*

37. Like Route A, Route B is shown on Ellis's Map of 1825 as a 'Cross Road'. Sanderson's 1835 Map similarly shows it as a 'Cross Road' although, unlike Ellis's Map, the key to this map does not distinguish bridleways as a category of way. Sanderson's 1843 Map, however, shows Route B uncoloured, whereas cross roads are shown coloured. Again it is not stated whether or not any of these maps derived from original surveys; and there is some inconsistency in how Route B is depicted between the Sanderson maps.
38. The OS 6" map of 1887 shows a Guide Post at the junction of Routes A and B. Such features the Council says are found on the main road between Walesby and Milton indicating both had public carriageway status. Again, whilst this suggests a need to identify destinations for users, I have seen no evidence that a guide post is indicative of a public vehicular way.

#### *Finance Act Map*

39. The whole of Route B is excluded from the adjoining land parcels. Again the Council says the only possible interpretation is that it was a public carriage road. Although there may be other reasons for a route to be excluded (paragraph 25) there is nothing in the wording of the West Markham Inclosure Award to suggest that applies here. I consider the exclusion of Route B from numbered hereditaments is not inconsistent with the possible existence of public vehicular rights.

#### *Other evidence*

40. The West Markham Highway Surveyor's Account Book (paragraph 26) includes an entry for 'Wood Lane', the alternative name, the Council says, for Westwood Road. I note that both this document and others concerning lane letting refer to both Westwood Road and Wood Lane, suggesting there were either two separate routes or a single route with different names, perhaps for different lengths. In either event, how much of Route B was let is unclear, and these records do not equate in my view to evidence that Route B was necessarily a public carriageway.

#### *Conclusions on the evidence*



41. I find the Teal map of little value as regards Route B. However, I place significant weight on the setting out of a public bridleway in the Inclosure Award over what was a pre-existing way.
42. Route B's exclusion from the Finance Act Map is strongly suggestive of public highway rights. Had the route been a bridleway at that time then it is likely it would have been included within the hereditaments, with a deduction claimed. The later maps and plans, however, are inconclusive, as are the lane letting records which are ambiguous and could indicate either a bridleway or a vehicular way.
43. I find the evidence is finely balanced. However, I conclude, on a balance of probability that public bridleway rights subsist, with the Inclosure records attracting the greatest evidential weight in this case. But, I find that the available evidence when considered as a whole falls short of tipping the balance in favour of a conclusion that public vehicular rights subsist. Accordingly, it is not necessary for me to consider the effect of the 2006 Act.

### **Route C (West Markham Bridleway 10 and Tuxford Bridleway 8)**

#### *Early map*

44. Teal's map shows parts of Route C, which the Council says, may be presumed formed part of a public carriage road linking West Markham with Mansfield. As stated above (paragraph 11), the map extracts are difficult to interpret given what appear to be later annotations, although I believe they show part of the northern end of Route C entering the Common land. I agree with the Objectors that the map was not produced to identify public rights of way. As above, the conclusions that can be drawn as regards the alignment and status of Route C are limited.

#### *Inclosure Records*

45. The 1799 Tuxford Inclosure Act (pre-dating the 1801 Inclosure Consolidation Act) authorised the Commissioners to set out public bridleways and footways. The 1804 Tuxford Award sets out, "*One other Public Bridle drift way or road and private Carriage road for the use and convenience of the owners and occupiers of Lands in Tuxford West Markham and Bevercoats of the breadth of Twenty seven feet branching out of the West Markham road at the West end thereof and running in a South Westwardly direction over the West Markham Allotment to the South East corner of the said Allotment thence southward between two Allotments herein Awarded to Trinity College to the Mansfield Road which we hereby distinguish by the Name of Kirton Road*".
46. The Award apparently describes a route, extending beyond the Tuxford Parish boundary into West Markham Parish. I have seen no evidence that the Commissioners had authority to award a route outside the Parish of Tuxford, and in that regard I agree with the Objectors. This longer route is, however, shown on the Inclosure Map and named 'Kirton Road'. As regards maintenance, the Award states this fell to the inhabitants and occupiers of land in Tuxford, except that part of Kirton Road affected by the allotments of owners and proprietors of cattle gates and common rights in West Markham and Milton. In addition, the Tuxford Award identifies the awarded route as a public bridle road, and a private carriage road for use by those stated. I share the

Objector's view that this was not intended to include all the residents of the named parishes, as the Council maintains (paragraph 15).

47. However, in examining the evidence I note on the Inclosure Award Map that the parish boundary with West Markham and Milton Parish is marked to the west of Route C's northernmost end, and south-west of its junction with Route A (and Route B). Parcels of land here are shown already enclosed. The 1887 OS map confirms these were part of Tuxford Parish. Furthermore, the OS map shows the parish boundary between Tuxford and West Markham running along Route C with the exception of two small sections, one being the northernmost end, the other between the route marked on the Inclosure Award Map as Leys Closes Road and the north-west corner of plot No.58, one of the two awarded to Trinity College. It follows in my view that the Commissioners were setting out a public bridleway within the extent of Tuxford Parish as it was at the time; although I do not consider they would have had the authority to award the route over the two small sections in West Markham.
48. The Council says Route C's depiction on the Teal map and the reference to an 'ancient gate' in the description of Bevercoats Wood Road, which branched off Kirton Road at the southern boundary of West Markham Parish with Tuxford Parish (also set out as a public bridle, drift way, or road, and private carriage road), is evidence of its pre-existence. The name Kirton Road, they say, is also significant as it indicates the route shown on the Teal map was already part of a public carriage road between West Markham and Kirton. However, I do not regard the naming of the road as evidence that it carried public carriageway rights.
49. As above (paragraph 17), the grass and herbage was to be vested in the Surveyor of Highways. Again, the Council argues that such lane letting indicated Route C was regarded as a minor parish and therefore public carriage road. I disagree since the Award distinguishes between public carriage and public bridle roads. It does not follow that all roads that were let for their grass were public carriage roads: some, like part of Route C, by reference to the Award, were public bridle roads.
50. The Objectors point out that the West Markham Inclosure Award of 1808 does not set out the continuation of Route C and as no route was set out in the West Markham Inclosure Award, it cannot have been regarded as a public highway. Route C is, however, shown on the West Markham Inclosure Award Map suggesting it physically existed and, as I have concluded above (paragraph 47), it seems that only two small sections of the route lay within that Parish. Connecting to Route C is Route D, described in the 1808 West Markham Inclosure Award as a footpath from Kirton to Milton, "beginning at Kirton Road on Westwood" and shown on the Map roughly half way along Route C. Accordingly Route C would have enjoyed public rights on foot at least between the Ollerton Road and Route D. However, the route in Tuxford was set out as a public bridle road and private carriage road and it seems unlikely that it would have been a cul-de-sac public bridleway, the short lengths in West Markham most likely enjoying the same status.

#### *Later maps and plans*

51. In common with Routes A and B, Ellis's Map of 1825 shows Route C as a 'Cross Road'. The Objectors say that no other routes shown on this map are identified as bridle or private roads, though undoubtedly some were of that status.

Sanderson's 1835 Map similarly shows it as a 'Cross Road', although the key to this map does not distinguish bridleways as a category of way, whereas, Sanderson's 1843 Map shows Route C uncoloured whilst cross roads are shown coloured. Again it is not stated whether or not any of these maps derived from original surveys; and there is some inconsistency in how Route C was depicted between the Sanderson maps. I note the Objectors' reference to the case of *Hollins v Oldham* [1995] in which the judge gave only qualified credence to the interpretation of cross roads as minor public roads.

52. The OS 6" map of 1887 shows Route C gated at either end of a partially enclosed section to the east of Farleys House, and again just before it reaches the Ollerton road.

#### *Finance Act Map*

53. Part of Route C, at its northern end, is excluded from adjoining land parcels, while the remainder falls within land parcels. Again the Council says the only possible interpretation is that it was a public carriage road. However, the Council also argues the Finance Act evidence is anomalous and should be treated with caution in the light of part of the route having been awarded in 1804 as running between allotments rather than over them. The Objectors say its depiction as a double hedged route is not inconsistent with that of an occupation road enabling landowner access to adjacent fields. Furthermore it is consistent with the later conveyance of Kirton Road by the Duke of Newcastle (paragraph 60).
54. Whilst the recording of public rights of way was not the primary purpose of the valuation exercise, the Finance Act Map evidence tends towards Route C not being a public road, but appears more consistent with an occupation or accommodation road over which lesser public rights could have existed. However, the relevant Field Book entries have not been provided. These may indicate whether or not deductions were claimed for a right of way over the relevant hereditaments.

#### *Other evidence*

55. The Tuxford Vestry Book of 1822 lists 6 days' work by labourers on "Westwood Road". Since Route C passes through the area known as Westwood (as marked for example on the Tuxford Inclosure Award Map), the Council concludes this was an alternative name for Kirton Road. Accordingly the expenditure of public money is consistent with it being a minor public road. Entries in the 1824 West Markham Highway Surveyor's Account Book include both Wood Lane and West Wood Road. The Council believes this must represent some or all of Kirton Road, or West Wood Road as described in the Vestry Book. However, these names could also refer to Route B (paragraph 40).
56. An 1839 list of roads and highways in the parish of Tuxford includes Kirton Road from the High Street to Kirton Gate, although this is more likely to be the main road, as the Council believes. The document states it does not include occupation roads. The Council argues that as Route C did not form a direct link between Tuxford village and surrounding villages (unlike those routes listed) it must have been viewed as an occupation road. This appears contrary to their argument that Route C was a minor public highway, in which case it would

have been listed. Route C is not listed, and it seems to me more likely that it was considered to be an occupation road in 1839.

57. Tuxford lane letting records for 1858 and 1865 list Westwood Road, and in 1869 and again in 1892, list Kirton Road. However, it is not clear whether these entries relate to the main road, or to Route C as awarded in 1804.
58. The West Markham Highway Surveyor's Account Book for lanes let from Lady Day 1839 lists "Westwood Roads", which implies more than one route of that name in the parish. But an 1892 Vestry Meeting regarding the letting of parish roads for herbage lists Kirton Road. Lane letting records list Wood Lane and Westwood in 1868 1869 1879 1881, but in 1890 list Wood Lane and "Tuxford and Far Lays". This could be Route C, as Farleys lies to the west.
59. Considered as a whole, there is some ambiguity in these records: it is not clear whether or not Route C is let, or whether parts or none of it was let over the years. As the Objectors point out, there is no other evidence that the route awarded as Kirton Road (or its continuation) was known as West Wood Road. In any event, as concluded above (paragraph 17) the records do not equate in my view to evidence that Route C, if let, necessarily carried public vehicular rights.
60. A Farm Agreement of 1917 between the Duke of Newcastle as owner and the tenant of Far Leys Farm shows that two land parcels formed part of Kirton Road. Similarly, an indenture of 1921 for Far Leys Farm from the Duke of Newcastle also refers to these parcels which are conveyed as an "occupation road". I agree with the Objectors that this evidence points to the land conveyed being owned by the Duke, and was considered to be an occupation road at the time.

#### *Conclusions on the evidence*

61. I find that the Teal map at best shows part of Route C existed prior to the enclosure of Westwood Common, although no conclusions can be drawn as to what rights may have existed over it. Again I place significant weight on the setting out of a public bridleway in the Tuxford Inclosure Award over Route C, with its description providing evidence of the reputation of its continuation as a public route through West Markham Parish. Although no corresponding lengths were awarded in West Markham, mapping postdating the Inclosure Award shows that Route C existed as a physical feature on the same alignment. It is likely that it enjoyed public footpath status at least, if not public bridleway status throughout its length.
62. The Finance Act evidence in relation Route C is inconsistent with part of the route excluded and part included in land parcels, but with no further information as to whether any deductions were made for public rights of way. The lane letting records, if attributable to Route C, are not inconsistent with public bridleway rights. The early 20<sup>th</sup> century conveyances do not preclude the existence of public rights.
63. In this case I consider the evidence as a whole is inconsistent with the existence of public vehicular rights, as claimed by the Council. However, I conclude, on a balance of probability that public bridleway rights subsist, with the Inclosure records attracting the greatest evidential weight in this case. Accordingly, it is not necessary for me to consider the effect of the 2006 Act.

## **Route D: (West Markham Footpaths 8 and 9)**

### *Inclosure Records*

64. The 1808 West Markham Inclosure Award describes from Kirton to Milton, "One other public footway of the width of six feet beginning at Kirton Road on Westwood and extending over an allotment No.144 in the said Map to Leys Closes Road and to a stile at the South East corner of a Close called Leys Close belonging to the said Duke of Newcastle in the Parish of Tuxford thence from the North East corner of the said Close over the Leys allotment No.145 in the said Map herein made to the vicar of West Markham and across Leys Road to and over allotments No.80 and No.82 in the said Map...to a Close called Ivy Croft Close thence along the said Close into and over an allotment No.71 in the said Map ...to Bevercotes Road".
65. The West Markham Inclosure Award Map shows Route D annotated "Foot Way Milton to Kirton". A copy of the Inclosure Act has not been provided, but the Council says it contains no specific reference to the setting out of public footpaths. As above (paragraph 33), the Commissioners were acting in accordance with the 1801 Inclosure Consolidation Act<sup>12</sup>. In the *Andrews 2015* judgement references to bridleways and footpaths are construed as meaning public; and the Commissioners were acting within their powers in setting out routes at less than 30 feet in width.
66. The description of the footway as being 'from Kirton to Milton' is submitted to be a clear indication it was an "inter-village path" in existence for some considerable time prior to 1808, rather than one established at the time of enclosure. To reach it from the south, it was necessary to follow Kirton Road, a route set out in the Tuxford Inclosure Award of 1804 (paragraph 45).
67. No footway is shown on the Tuxford Inclosure Award Map, but Leys Close did not form part of the lands to be inclosed. If there was no pre-existing path across it, then the footway set out by the West Markham Commissioners would have been a cul-de-sac at either end. In addition, Ivy Croft Close (through which the footway passes), the Council says, was an "ancient inclosure".

### *Later maps and plans*

68. No OS maps were produced between 1808 and 1887, and the awarded footpath is not shown on the 1887 map.

### *Conclusions on the evidence*

69. There is no map predating the 1808 Inclosure Award to show the alignment of any footpath that may have pre-existed it. Nevertheless, the description suggests there may have been an old route which it followed or replaced in whole or part. There is no corresponding footpath set out in the Tuxford Award, but the land in question had already been inclosed.
70. I conclude, on a balance of probability that public footpath rights subsist, as evidenced by the Inclosure records.

## **Other matters**

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<sup>12</sup> Section 10

71. Safety, suitability and environmental concerns were raised by some of those objecting to the Order. Whilst I understand the importance of such concerns to those affected, they are not ones that I can take into account in my consideration of the Order under the 1981 Act. My determination must be based on the existence or otherwise of public rights over the Order routes and their status.

### **Overall Conclusion**

72. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed with modifications so as to record Routes A and B as Bridleways rather than Byways, and to record Route C as a Bridleway and Route D as a Footpath. In addition, references to West Markham Footpath 7 should be added to the Order where necessary, and all widths recorded should be amended by removal of the word 'minimum'.

### **Formal Decision**

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

- Delete the word 'Byway' wherever it occurs and replace with 'Bridleway'
- In the title of the Order, after 'Bridleway No.10', insert "and No.7 (part)"
- On page 3 of the Order, under 'Description of the Paths or Ways to be upgraded', for Tuxford Footpath No.8, delete '10' in line 2 and replace with "7 (part)", and again on page 5, under 'Description of Path or Way to be modified' for Tuxford Bridleway No.8, delete '10' in line 2 and replace with "7 (part)", and add a new paragraph as follows,

"West Markham Bridleway No.7 (part)

Commencing from a point SK70707033 at the junction with West Markham Bridleway No.10 and proceeding for a distance of approximately 1.5 metres in a south-south-westerly direction to a point SK70707033, at the junction with Tuxford Bridleway No.8 and having a width of 3 metres throughout the whole of its length."

- In the Schedules to the Order, delete the word "minimum" where it occurs
- On the Order plan, delete 'Proposed Byway' from the key and amend the notation of the routes currently marked as Byways, to Bridleways and insert "& No.7 (part)" after 'Bridleway 10', and "BW7" at 'SK70707033'

74. Since the confirmed Order would show as a highway of one description a way which is shown as a highway of another description in the Order as submitted, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 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.

*S Doran*

**Inspector**