
Order Decisions

Site visits made on 15 July 2015

by Alan Beckett BA MSc MIPROW

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

Decision date: 5 August 2015

Order Ref: FPS/L3055/7/80 (Order A)

- 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 Markham Footpath Nos. 4 and 34) Modification Order 2010.
- The Order is dated 5 March 2010 and proposes to modify the Definitive Map and Statement for the area by adding two public footpaths as shown in the Order plans and described in the Order Schedule.
- There were 4 objections outstanding when Nottinghamshire County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Order Ref: FPS/L3055/7/83 (Order B)

- This Order is made under Section 53 (2) (b) of the 1981 Act and is known as the Nottinghamshire County Council (East Markham Footpath No. 35) Modification Order 2012.
- The Order is dated 27 January 2012 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were 2 objections outstanding when the 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 the modifications set out in the Formal Decision.

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Orders. I have therefore considered these cases on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the routes at issue from public vantage points on Wednesday 15 July 2015.

The Main Issues

2. The Orders were 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 that Act. For the Orders to be confirmed, I must be satisfied that the evidence discovered, when taken with all other relevant evidence is sufficient to show on a balance of probabilities, that public rights of way which are not shown in the map and statement subsist over land in the area to which the map relates.
3. No evidence of use of the claimed footpaths by the public has been submitted in these cases. The evidence submitted is drawn from documentary sources

and the main issue is whether that documentary evidence demonstrates, on a balance of probabilities, the subsistence of public rights of way on foot over the Order routes.

Order A

Documentary evidence

Railway plans

4. The construction of the railway at East Markham was authorised by the Great Northern Railway Act 1846 which was repealed by the Great Northern (Grantham to York) Act 1847. The Council submitted extracts from the deposited plan and book of reference to the 1846 Act and Network Rail submitted an extract from the deposited plan from the 1847 Act. The extracts are identical and it is likely that the documents drawn up for the 1846 Act were subsequently used for the purposes of the 1847 Act.
5. The deposited plan shows what is now recorded as footpath 3 running from the village to its original junction with Top Cart Gaps. Slightly to the west of this point another footpath runs in a north westerly direction over fields to Askham Road on the alignment of footpath 4. In the book of reference, the parcels of land crossed by the routes shown on the plan all record the existence of a 'footpath' within the fields.
6. There is no indication in the book of reference as to the status of the path being recorded; the only routes described as 'public' and in which the surveyor of highways had an interest were the public carriageways within the parish. Although the railway evidence is not conclusive as to the public status of the footpaths shown, neither is it conclusive that the routes were private; the alignment of the paths shown in the deposited plan suggests that they may have formed part of a through route between the villages of East Markham and Askham.
7. The deposited plan from 1850 for the 'Towns line' section of the Great Northern Railway shows the pre-railway alignment of the fields, tracks and paths. Extracts from the Book of Reference were not submitted, but the plan clearly shows footpath 4 running from Askham Road to Top Cart Gaps. The accommodation bridge (No. 294) built at this location would have been capable of carrying both private agricultural traffic and any pedestrian traffic which had habitually used the footpaths shown to have been in existence prior to the railway being built.
8. With regard to footpath 34, the railway plans only record a 'farm road' running north towards East Meadow Road from the right angle bend in Top Cart Gaps. An accommodation bridge (no 293) was built as part of the development of the railway. Although the railway plans do not suggest that a public right of way existed on the alignment of the claimed path prior to the construction of the railway, this does not preclude the subsequent acquisition of public rights through long use.

Ordnance Survey maps

9. The six inch to 1 mile map published in 1888 shows the post-railway landscape and that footpath 4 runs from Askham Road to the realigned section of Top Cart Gaps which was constructed to the north of the railway. This section of

Top Cart Gaps is in turn linked to the re-aligned section to the south of the railway by means of bridge No. 294. From the re-aligned section of Top Cart Gaps on the southern side of the railway, footpath 3 is shown to run south towards East Markham.

10. The 25 inch to 1 mile map of 1920 shows footpath 4 on the same alignment as the 1888 6 inch edition with a minor variation near its junction with the accommodation track on the north side of the railway. There is no indication on this map of any gates or other obstructions which would have prevented or restricted pedestrian traffic over bridge 294.
11. Although the OS maps do not provide evidence of the status of the route, they demonstrate that during the late nineteenth and early twentieth centuries it would have been possible for pedestrians to travel between East Markham and Askham on footpath 3 and 4 utilising bridge 294.
12. With regard to footpath 34, the path is shown on the 6 inch to 1 mile map of 1888 by means of a double peck line which commences on the access track on the north side of the railway and runs north to East Meadow Road. The path is annotated 'F.P.'. The path is shown in the same way on the 25 inch to 1 mile maps published in 1900 and 1920. Although OS maps do not provide direct evidence of the status of the route they demonstrate the continued existence through time of a path on which pedestrian traffic was likely to be encountered. The natural southern outlet for any pedestrian traffic using the path would have been over bridge 293 to Top Cart Gaps.

Finance Act 1910

13. The whole of Top Cart Gaps, bridge 294 and the track on the northern side of the railway is excluded from claimed ownership on the Finance Act plan. The Council submit that the exclusion from assessment is indicative that the route was a public highway at the time of the survey, as Top Cart Gaps was depicted in the same manner as other known public roads. However, as an accommodation road Top Cart Gaps is unlikely to have had any development value and is unlikely to have been assessed for incremental land value duty unlike the land served by that route.
14. Whilst I do not consider that the Finance Act documents provide evidence of the status of the route over bridge 294, they are not inconsistent with the Council's assertion that bridge 294 was subject to a public right of way.
15. Bridge 293 was similarly excluded from assessment under the Finance Act survey. The remainder of footpath 34 ran through hereditaments 204 and 205 before reaching East Meadow Road. The field book entry for hereditament 204 states that it was crossed by a '*Public Footpath from Top Cart Gaps Lane to the bottom of old Moorgate Lane*' and a reduction in site value of £20 was made as a result. The majority of claimed footpath 34 runs through this hereditament which may explain the magnitude of the reduction in value compared with hereditament 205.
16. The entry for hereditament 205 records that there was a '*right of way across Tongue Close*' and that a reduction in site value of £5 was allowed for a footpath in field 126 which due to its shape is likely to have been Tongue Close. As there is only one track or way shown to cross field 126 on the OS plan used for the survey and that route corresponds to the Order route, it is

reasonable to conclude that the reduction in site value was granted for the existence of a public right of way over the Order route. With regard to footpath 34, I consider that I can attach some weight to the Finance Act documents as evidence of the existence of public rights over the Order route.

Parish Survey of Rights of Way and Definitive Map records

17. The East Markham parish survey of June 1951 recorded the route over bridge 294 as part of route 3 which ran from Top Cart Gaps to Askham Road; the schedule notes that public use of the route had occurred for 50 years. When the draft map was published in 1957 the claimed route 3 was shown as footpath 3, part of RUPP 2 and footpath 4; the section over the bridge being part of RUPP 2.
18. The parish survey recorded footpath 34 as claimed path 4 which ran from Top Cart Gaps at "2nd railway bridge" to East Meadow Road and noted that there had been uninterrupted use of the path for 50 years. The path was recorded as footpath 5 on the draft map and was shown commencing on Top Cart Gaps, crossing the railway via bridge 293 and running north to East Meadow Road. The Council do not know why the path was omitted from the provisional map as there is no record of an objection to its inclusion on the draft map having been made, either by the British Transport Commission or any other party.
19. In August 1961 the British Transport Commission objected to the inclusion of bridge 294 as part of a right of way on the grounds that it had been constructed as an accommodation bridge. Although the Parish Council initially resisted the objection on the basis that the path had been used by the public for over 50 years, by July 1962 the Parish Council's position had changed and did not oppose the 'closure' of the path. Consequently the route over bridge 294 was not shown on the provisional map when it was published. The provisional map shows that footpath 4 commenced at the north-eastern end of the bridge with footpath 3 terminating at Top Cart Gaps.

Other evidence

20. In his written representation, Mr Hardy recalled the existence of bridges 293 and 294 and recalled having walked over them as part of circular walks around the village prior to their demolition in 1977.

Bridge 293 and 294

21. The bridges and the alignment of Top Cart Gaps prior to their demolition in 1977 are clearly shown on aerial photographs of the area taken in 1964, 1971 and 1974. Both bridges were removed by British Rail in 1977 having entered into deeds of release with those parties who had private rights of access over the bridges. Network Rail submit that due consideration was given to whether public rights existed over the bridges however the plans consulted showed footpaths to the north and to the south but not passing over the bridges. Enquiries made of the Council in the mid 1970s resulted in the Council confirming that no right of way ran over the bridges.

Summary

22. The documentary evidence demonstrates that prior to the building of the railway there were footpaths to the north and south of Top Cart Gaps which provided a means of pedestrian travel between East Markham and Askham.

Although bridge 294 was constructed to provide private access from Top Cart Gaps to fields to the north of the railway the bridge would also have provided a means of continued access for pedestrians travelling between villages. All the OS maps consulted demonstrate that footpath 4 ran to the accommodation track to the north of the railway; there is no evidence of any barriers or gates on the bridge which would have prevented pedestrians from crossing it. The parish survey provides evidence of use of a path over the bridge and of the local reputation that the bridge had carried a public right of way. Mr Hardy's evidence demonstrates that public use of bridge 294 continued until it was demolished.

23. Although none of the documents considered provides conclusive evidence of the existence of a public right of way over bridge 294, collectively they provide a body of evidence which is consistent with a public right of way having existed prior to the railway being constructed and which was accommodated by the building of bridge 294.
24. With regard to bridge 293, whilst the deposited railway plans are silent on the existence or otherwise of a public footpath on the route of footpath 34, OS mapping from the late nineteenth and early twentieth centuries shows the continued existence of a route which was subject to pedestrian traffic. That such traffic was pursuant to a public right of way is supported by the Finance Act documents where specific reference is made to a '*public footpath*' from Top Cart Gaps to East Meadow Road. The parish survey of 1951 demonstrates that public use of this route had continued through the first half of the twentieth century and Mr Hardy's evidence demonstrates that such use continued until 1977. Taken collectively, the evidence is sufficient to demonstrate, on a balance of probabilities that a public right of way utilizing bridge 293 had come into existence by the time of the Finance Act survey.
25. Although neither Order route appeared on the provisional map there is no evidence that those public rights of way which either pre-dated the railway or were acquired at some date prior to the Finance Act survey have been formally stopped up; consequently those rights remain and should be recorded on the definitive map.

Other matters

26. The removal in 1977 of bridges 293 and 294 by British Rail has no impact upon the existence of the public rights of way which had been supported by those bridges. The public right remains although there is no practical means by which that right can be exercised. In my view, the removal of the bridge has not led to the loss or destruction of the rights of way which ran over them; the public footpath over the railway is currently out of repair and will be unusable until such time as the bridges are replaced or the line of footpaths 4 and 34 formally diverted.
27. Network Rail submit that they are under no statutory obligation to construct new bridges to carry the footpaths over the electrified East Coast Main Line and that the footpaths cannot cross the line on the level. Network Rail's submission on its statutory obligations has not been challenged and I agree with Network Rail that the rights of way do not cross the railway on the level; those parts of footpaths 4 and 34 which cross the railway do so above the railway cutting and are currently without any means of support.

28. I note that Network Rail states that it is prepared to work with the Council to seek the diversion of the footpaths to create circular walking routes in the vicinity of the railway should the Order be confirmed. Whilst there are specific provisions within the Highways Act 1980 for the diversion of public rights of way which cross operational railways, the question of the future management of the footpaths is not within my remit which only extends to a determination of whether the claimed rights of way subsist.
29. The objections made with regard to the desirability of the footpaths, the purpose they would serve, the proximity of other footpaths and the impact footpath 34 would have on agricultural practices are not matters which I can take into account in reaching my decision.

Conclusion - Order A

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

Order B

Railway plans

31. The 1846 deposited plan for the Tuxford deviation of the Great Northern Railway shows the claimed path by means of a pecked line as are other footpaths in the vicinity of the proposed railway. The schedule describes the route as a 'footpath' running through a pasture and an orchard. No reference is made in the schedule to the surveyor of highways having an interest in the land crossed by the footpath; however, the surveyor of highways is not recorded as having an interest in what are now footpaths 7, 9, 24 and 25. Consequently I do not attach significant weight to the omission of the surveyor from the schedule as being evidence that the Order route was not a public footpath at the time of the railway survey.

Ordnance Survey (OS) maps

32. The claimed path is shown by a double pecked line running through a pasture and an orchard on the 6 inch to 1 mile map of 1887. Adjacent footpaths (now footpath 25 and footpath 11) are annotated 'F.P.', whereas the claimed route has no such annotation. On the 1900 25 inch to 1 mile map the claimed path is labelled 'F.P.' and is shown in the same manner as the earlier 6 inch map. The 1920 25 inch map shows the claimed path in the same way as the 1900 edition but with the addition of a footbridge at Quakefield Lane. The OS maps demonstrate the physical existence of the claimed footpath through time although they do not directly provide evidence of the status of the path.

Finance Act 1910 records

33. The Finance Act map shows the claimed footpath as running through the southern part of hereditament 208 and through the adjoining hereditament 197. A reduction in land value of £40 was allowed for hereditament 208 for the existence of '*Right of Way across some fields*'. As hereditament 208 was also crossed by part of what are now footpaths 24 and 25, it is by no means certain that the existence of a public right of way over the claimed route contributed to the reduction in the assessed value of the land. With regard to hereditament 197 a reduction in value of £5 was allowed for a '*Public Footpath from Quakefield Lane to Back Lane near Nooking*'. Given that the claimed route is

the only path or track shown by OS as passing through hereditament 197 it is more likely than not that the reduction in value was granted for the existence of a public right of way over the Order route. The description of the footpath through hereditament 197 also provides support for the section of the path running through hereditament 208 as having contributed to the reduction in site value of that parcel of land. Although not conclusive of the existence of a public right of way at the time of the survey, the Finance Act records provide evidence of some weight in support of the Council's case that a public right of way on foot subsists over the Order route.

Definitive Map Survey records

34. As part of the survey of public rights of way made under the provisions of the National Parks and Access to the Countryside Act 1949, the Order route was recorded as part of footpath 11 which ran from the eastern side of the railway to the Tuxford parish boundary. The parish claim was made on the basis that the path had been used by the public for in excess of 40 years. The schedule notes the existence of a stile near the railway line but the footbridge shown in earlier OS maps is not mentioned.
35. The Order route was shown to be part of footpath 11 on the draft map of public rights of way which was published in 1957. The Order route was not shown on the provisional map published in 1966 although the reasons for the deletion of the path are not known; the Council suggests that the path may have been considered to be of limited public use without the footbridge. Despite the non-appearance of the path on the provisional map, the parish survey and draft map provide evidence of the reputation of the Order route as a public right of way prior to the 1960s.

Summary

36. None of the documentary sources consulted provide conclusive evidence of a public right of way over the Order route. However, the documents are consistent with the route enjoying a reputation as a public right of way from the middle of the nineteenth century until the middle of the twentieth century.
37. Neither of the statutory objectors has submitted any documentary evidence from which a contrary conclusion could be reached, nor have the objectors submitted an analysis of the available documentary evidence which is contrary to that put forward by the Council. Although the documentary evidence adduced in this case is limited, I consider it sufficient to demonstrate, on a balance of probabilities that a public right of way on foot subsists over the Order route.

Width

38. One of the statutory objectors submits that a width of one metre to be recorded in the definitive statement is too narrow for the reasonable use of the public and that the width of the footbridge should also be specified in the Order. The Council respond by stating that in the absence of a width being specified in any of the documentary evidence there was no legal basis for specifying a width greater than the default width for a cross-field path. With regard to the width of the footbridge, the Council submits that as the path has a width of 1 metre throughout its length and as the bridge forms part of the path, the bridge will be 1 metre in width.

39. The Council did not enlarge upon its reference to the 'default width of a cross-field footpath'. The only reference within current highways legislation that I am aware of which specifies the width of public rights of way is in relation to the widths to which paths must be restored following ploughing; schedule 12A to the 1980 Act states that a cross-field path shall be restored to a width of 1 metre and it may be that this is the source of the Council's submission. In modification order cases the width to be recorded has to be based on the available evidence in exactly the same way that the existence of the footpath is based on the available evidence.
40. In those cases where the width of the footpath is not known, the guidance offered by Advice Note 16 published by the Planning Inspectorate is that *"determination of the width will, if not defined by any inclosure award, physical boundary or statute, be based on evidence provided during the confirmation process, or, where there is no such clear evidence, the type of user and what is reasonable. Circumstances, such as the nature of the surface and other physical features, may dictate what may be considered reasonable. In the absence of evidence to the contrary, Inspectors should ensure that the width recorded is sufficient to enable two users to pass comfortably, occasional pinch points excepted"*.
41. In this case none of the documents consulted offer any assistance with the determination of the historic width of the path. The only document where width is specifically mentioned is the parish survey of June 1951 and even that document is unhelpful as the response to the question of width was that the width of the path was *"not defined"*. The OS 25 inch plan of 1920 shows the path as having a uniform width of 2 metres however, as all cross-field paths in the immediate vicinity of the Order route are shown at the same width, the depiction of the path may have more to do with cartographic convention and may not reflect the actual width of the footpath at the time of the survey.
42. A determination of the width of the footpath in such circumstances is therefore dependant upon what can be deemed to be reasonable for pedestrian use. I noted at my site visit that the cross-field sections of footpath 25 and footpath 11 had been re-instated following ploughing to a width of 1.5 metres through the growing crops. The Order route is on the fringe of a large village and the nearby rights of way appear to be well used. In such circumstances I consider that a width of 1.5 metres throughout the length of the path including a bridging of the dyke at Quakefield Lane would be sufficient to allow two pedestrians to pass in reasonable comfort along the Order route.

Other matters

43. The other statutory objector has known the land since the 1950s and submits that to his knowledge there have not been any sign of a footpath over the dyke or through the hedges; he has no knowledge of when the path might have last been in use by the public. The objector also notes that the path begins or ends at the railway line and that the former crossing has been stopped up with a new path running parallel to the railway being provided. In his view, the Order route would mean two footpaths running in the same small field leading to a point on Quakefield Lane about 140 metres apart.
44. Whilst I acknowledge the concerns which the objector has regarding the recording of this route as a public footpath, the process under section 53 of the 1981 Act is concerned with recording those public rights of way shown to be in

existence but hitherto unrecorded; it is not a process whereby what is considered to be desirable or preferable is recorded. The objector's submissions on these points are not ones which I can take into account.

Conclusions – Order B

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

Formal Decision – Order A

46. I confirm the Order.

Formal decision - Order B

47. I propose to confirm the Order subject to the following modification:

- (i) in the schedule Part II amend line 5 to record the width of the path being 1.5 metres throughout its length.

48. Since the Order as proposed to be confirmed would affect land not affected by 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.

Alan Beckett

Inspector