
Order Decision

Site visit made on 26 February 2015

by Alison Lea MA (Cantab) Solicitor

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

Decision date: 11 February 2016

Order Ref: FPS/L3055/7/71M1

- 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 (Sturton le Steeple Footpath No 25 and Restricted Byway Nos 30,31, 32 and 33) Modification Order 2005¹.
- The Order is dated 6 May 2005 and proposes to modify the Definitive Map and Statement for the area by adding and upgrading bridleways and adding byways as shown in the Order plan and described in the Order Schedule.
- In accordance with paragraph 8(2) of Schedule 15 to the 1981 Act I have given notice of my proposal to confirm the Order subject to modifications.

Summary of Decision: I propose to confirm the Order subject to some of the modifications that I formerly proposed and to further modifications which require advertising

Procedural Matters

1. The effect of the Order if confirmed with the modifications that I previously proposed would be to upgrade the bridleway sections of Routes B, C and D to restricted byways and to add the remainder of those routes as restricted byways. It would also upgrade Route E from a bridleway to a Byway Open to All Traffic (BOAT).
2. Following notification of my proposed modifications 10 representations were received within the statutory period specified. Only one of these, made by Nottinghamshire County Council (NCC), relates to the proposed modifications and is a duly made objection. As NCC did not ask to be heard, the objection is to be determined by written representations. The objections made by GMT Foljambe 1996 Trust (GMT) and Diana Mallinson (DM) relate mainly to the unmodified part of the Order but contain new evidence.

The Main Issues

3. The objection from NCC states that there is no legal justification for my conclusion that an application made by a local authority officer is not valid for the purposes of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) and that the exemption set out in Section 67(3)(a) of that Act does not apply. However, DM submits that the application in respect of Route E also fails to qualify for exemption under Section 67(3) of the 2006 Act.
4. NCC maintains that Route A should be recorded as bridleway whereas DM has submitted further evidence and claims that it should be recorded as a public footpath. DM has also submitted further evidence with regard to Routes C and

¹ Subject to the proposed modifications

D and claims that that evidence may tip the balance in favour of recording those routes as bridleways rather than as restricted byways. GMT has raised a number of points with regard to Route E.

5. I shall deal with matters concerning the 2006 Act first and then with the issues specific to each of the routes.

Reasons

The 2006 Act

6. With reference to my proposed modifications to Routes B, C and D, NCC refers to a letter from Defra to the Planning Inspectorate dated 15 February 2008 which states that an Inspector is not empowered to examine compliance with Schedule 14 of the 1981 Act and therefore that *"even where it is questionable whether a BOAT application made by an order-making authority to itself engages the exception in section 67(3) of the 2006 Act.....the opportunity to challenge the validity of the order has now passed and the application should be regarded as a section 53(5) application for the purposes of the Inspector's determination. It follows therefore that the exceptions in section 67(3) would be engaged....."*
7. The letter referred to and quoted by NCC predates the Court of Appeal judgement in *R (Warden and Fellows of Winchester College and Humphrey Feeds Limited) v Hampshire County Council and SoSEFRA [2008] (Winchester)*. A further letter from Defra to the Planning Inspectorate dated 2 June 2008 sets out Defra's view of the implications of that decision. Paragraph 13 states that *"in the light of the Court of Appeal judgment in the Winchester case, we have now come to the view that it is likely that a court would rule that, as an application made by the order-making authority to itself is not a section 53(5) application, the exceptions in section 67(3) would not be engaged, and therefore any public rights of way for mechanically propelled vehicles which might exist over the way concerned, would have been extinguished by section 67(1) of the NERC Act"*.
8. I accept that, as pointed out by NCC, there is no case law directly on the point in question. However, for the reasons given in paragraph 39 of my interim decision, I consider that an application made by the order making authority to itself is not a valid application for the purposes of the 2006 Act. I consider that such an application is not a "qualifying application" for the purposes of section 67(6) and accordingly, although not making the order invalid, it does mean that the public right of way for mechanically propelled vehicles has been extinguished. When read in its entirety, there is nothing in the correspondence from Defra which would lead me to a different conclusion; indeed it is supportive of my view. Subject to other matters discussed below I therefore conclude that Routes B, C and D should be recorded as restricted byways rather than BOATs.
9. In my interim decision I state that the application in respect of Route E "appears to have been made in the prescribed form with copies of evidence relied on and accompanied by a map to the required scale". The evidence for this is a copy of the application made by Mr Seagrave dated 29 January 2003 which under the statement, "I attach copies and list below the following documentary evidencein support of this application", lists the various

documents relied upon. A copy of an OS plan showing Wood Lane is also attached.

10. DM has provided a copy of a letter from Mr Seagrave to NCC dated 19 November 2002. It states that he is applying for a modification order and lists 8 documents supporting the application. 5 of them are followed by the word "enclosed" but three are not. A second application was submitted by Mr Seagrave dated 29 January 2003. It lists the same documents as the previous application and suggests that the documents were submitted. However, DM states that she has looked at NCC's file and it does not contain the 3 documents listed in the November 2002 letter which were not followed by the word "enclosed". She therefore submits that both the November 2002 and January 2003 applications omitted copies of this evidence. NCC has failed to comment on this matter.
11. In the Winchester case, Dyson LJ states "*in my judgement, section 67(6) requires that ...the application must be made strictly in accordance with paragraph 1 [of Schedule 14 to the WCA 1981]. It must be made in a certain form....accompanied by certain documents. The applicant is required to identify and provide copies of all the documentary evidence on which he relies in support of his application*". In the absence of a response from NCC and on the evidence now available to me, it appears that Mr Seagrave did not provide copies of all the documents and accordingly the application fails to qualify for the exemption in section 67(3)(a) of NERCA 2006. This has the effect that a restricted byway rather than a BOAT should be added in respect of Route E.

Route A

12. LCC objects to my proposed modification to delete Route A from the Order and DM claims that Route A should be added to the definitive map and statement as a public footpath. LCC states that the documentary evidence shows that Route A was part of a minor public road between Fenton and Clarborough/Welham which has existed since 1825 at the latest. However, for the reasons given in my interim decision, although I accept that the map evidence shows the physical existence of Route A in 1825, I consider that evidence insufficient to demonstrate public rights.
13. In my interim decision I stated that the Inclosure Award of 1828 did not create any public rights over Route A and this is not disputed. However, DM has provided further extracts from the Inclosure Award in relation to a route described as "one other Public Foot Road of the width of four feet called "Leverton and Wheatley foot Road" leading from the West End of Dumps Road....proceeding in a North Westwardly direction over Allotment No. 184....to an ancient stile leading into field Close....".
14. A further ancient stile is referred to in the description and DM submits that the references to ancient stiles indicate that it was a pre-existing footpath. She also states that it seems unlikely that the footpath would have terminated at the western end of Dumps Road, especially as it is named as connecting Leverton (the parish to the south of Sturton) with Wheatley (the parish to the north). I agree with her that it seems more likely than not that Dumps Road and Dog Hole Lane had public footpath rights at the time of the Inclosure Award, although such rights are not mentioned in the award.

15. I accept NCC's contention that if over time part of Route A became "incorporated" or "absorbed" into adjoining fields this would not affect any pre-existing public rights. However, for the avoidance of doubt the reference in paragraph 23 of my interim decision to "part of Route A" existing at some times but not at others, is a reference to its physical existence and not to the existence of public rights. In any event, on the basis of the evidence before me, I now accept that on the balance of probabilities, public footpath rights existed over Route A at the time of the Inclosure Award and there is no evidence before me to suggest that those rights have been extinguished.
16. NCC submits that on the balance of probabilities use by horses of Route A has been continuous since Bridleway 25 was included on the Draft Map for Area 6, dated April 1957. No evidence of use has been submitted and the suggestion that it is "hardly likely that users of Bridleway 25 would have got to the end of the path and turned round, given that a continuation of the route existed on the ground, either as part of a grass field or as a field edge track, and then along Dog Holes Lane" falls far short of evidence sufficient to support a claim under either Section 31 of the Highway Act 1980 or common law dedication and acceptance. The statement that NCC has never received any complaints from members of the public that the "extension of Bridleway 25" was obstructed or inaccessible and that the owner of the land has not provided any evidence that it has not been used by the public does not take matters any further.
17. There is nothing in any of the other matters referred to by either NCC or DM which would lead me to alter my conclusion that the evidence is insufficient to show, on the balance of probabilities, that public bridleway rights exist over Route A. However, I now consider that, on the balance of probabilities, public footpath rights exist over Route A and I therefore propose to modify the Order accordingly.

Route B

18. No new evidence has been provided in respect of Route B and it should therefore be confirmed as a restricted byway as set out in my interim decision.

Route C

19. In my interim decision I state that the OS Object Names Book refers to the various lanes which make up Route C as public roads. DM suggests that Route C may have been referred to as a public road due to it being a public bridle road which had been publicly maintainable since that date. She provides an extract from the Inclosure Award which states that "all such public carriage roads or highways bridle roads and footroads as have been by us set out....shall at all times hereafter be amended and kept in repair in the same manner as the other public roads in the said parish". I accept that this suggests that a public bridle road would have been maintained at public expense. However, there is no evidence to suggest that this is the reason why the various lanes are referred to in the Object Names Book as public roads. She also suggests that if the public bridleway was maintainable at public expense this could explain why it appears on the list of streets.
20. DM also suggests that the lane letting records do not assist in determining status. She provides an extract from the Inclosure Award containing a "declaration as to herbage of roads" which specifies who was entitled to grazing

- on all the roads, both public and private, set out by them. She then points out that some of the lanes named in the letting books were awarded as private roads by the inclosure commissioners and suggests that the letting books are an evolution of the grazing rights specified by the commissioners. It is not possible to ascertain whether or not this is the case but I accept, as made clear in my interim decision, that the fact that the grazing of lanes was treated as parish property does not mean that public vehicular rights necessarily existed over those lanes.
21. DM has provided a copy of the enabling act for inclosing land in Sturton in the Steeple. It authorises the commissioners to set out "public and private Roads, Highways and Paths" and specifies that "the same (except the said public Roads, Highways and Paths) shall respectively be made, and at all Times thereafter kept in repair, at such Times and by such Person or Persons, Proprietor or Proprietors, and in such Manner as the said Commissioners, by their Awards....shall order".
 22. The Award then sets out that private carriage roads were to be privately maintained, with the overall cost shared by the "several proprietors" specified in Schedule A to the award. From this DM suggests that the exclusion of Route C from hereditaments in the Finance Act records is consistent with its inclosure award status of a private carriage road for use by a number of people. I accept that there are some cases of private roads set out in inclosure awards for the use of a number of people, but without ownership being assigned to any individual, being shown as excluded from hereditaments. However, such an approach has not been consistent. In the absence of further information it seems more likely that the route was excluded as it was considered to be a public vehicular highway.
 23. In my interim decision I refer to part of Route C having been included on the Draft Definitive Map as part of CRFs 9 and 11 which the Council states were subsequently reclassified as bridleways in 1985 on the grounds that they were more suitable for such use. DM suggests that this is not the reason for the reclassification. She has provided a copy of the London Gazette notice which required objections to the proposals for reclassification under the Countryside Act 1968 to be made by 28 November 1973. She suggests that as the route was not reclassified until 1985, objections must have been made which resulted in delay and the route being reclassified under section 54 of the 1981 Act, under which suitability was not a criteria. She submits that if the Council reclassified the route under the 1981 Act then it must have considered that the evidence available then, in 1985, showed that public vehicular rights did not exist. She suggests that the Council should be able to provide information about the reclassification from its records.
 24. The Council has failed to respond to DM's statement and I therefore do not know the basis for the Council's assertion that the route was reclassified on the ground that it was more suitable for use as a bridleway. There is no information available to me to assist in ascertaining why the reclassification did not occur until 1985 and it may be that DM is correct. However, in the absence of further information I am unable to attach significant weight to her suggestion.
 25. In conclusion, I accept that the exclusion of Route C from hereditaments in the Finance Act documentation does not necessarily mean that public vehicular

rights exist. I also accept that there may be reasons, including that the bridleway was maintainable at public expense, why it was described as a road in the OS Objects Name Book and included in the List of Streets. I also note the lack of information which has been provided with regard to the reclassification.

26. However, on balance I conclude that the further evidence made available is insufficient to alter my conclusion that, when considered in totality, the evidence indicates that it is more likely than not that Route C became a public vehicular way at some time after 1836. As none of the exemptions in the 2006 Act apply it should therefore be recorded as a restricted byway.

Route D

27. DM makes similar points with regard to the lane letting records, Finance Act documentation and the 1985 reclassification in respect of Route D. In addition she states that the description of Upper Ings Lane in the OS Object Name Book should, after the reference to the Mother Drain, read "opposite junction of Knaith Hall Lane, Middle Lane & South End Lane". I agree that this is correct. She points out that Knaith Hall Lane, Middle Lane and South End Lane are all described in the OS Object Name Book as occupation roads which would mean that Upper Ings Lane was a cul-de-sac for public vehicular rights as it was continued solely by occupation roads.
28. In my interim decision I note that Middle Lane, which forms the link between Cowpasture Lane and Trent Furlong Road (otherwise known as Upper Ings Lane) is described as an occupation road but conclude that on the balance of probabilities, it acquired public vehicular rights, albeit that may have been at a later date. I note that both Knaith Hall Lane and South End Lane are excluded from adjoining hereditaments on the Finance Act plan in the same way as Middle Lane, and indeed Cowpasture Lane and Trent Furlong Road.
29. Taking this and all other matters raised by DM into account I conclude that the additional evidence provided is insufficient to alter my conclusion that although finely balanced the evidence indicates that it is more likely than not that public vehicular rights existed. As none of the exemptions in the 2006 Act apply it should therefore be recorded as a restricted byway.
30. In the interests of clarity I also note that although the evidence from the Inclosure Award is correctly referred to in paragraphs 58 and 59 of my interim decision, there is an error in paragraph 68 and the words "public bridleway but only" should be deleted from the fourth line of that paragraph.

Route E

31. The comments from GMT relate solely to Route E and most of the matters raised do not amount to new evidence. However, it is suggested that there is doubt whether the route referred to in the Railway Documentation is indeed Wood Lane as Route E is not the most direct route between Sturton le Steeple and Wheatley. However, the Railway Documentation plan clearly shows Wood Lane labelled as 32. No 32 is described as "Public Highway leading from Sturton le Steeple to Wheatley" and, as set out in my interim decision at paragraph 75, the cross section on the plan also refers to a "public road". I therefore conclude that there is no basis for the doubt expressed.

Conclusions

32. For the reasons given, I now conclude that the Order should be confirmed subject to the modifications I previously proposed in respect of Routes B, C and D and subject to additional modifications. These are that Route A should be added to the definitive map and statement as a public footpath and that Route E should be upgraded to a restricted byway rather than to a BOAT.

Formal Decision

33. I propose to confirm the Order subject to modifications. In the interests of clarity the modifications set out below are to the original Order as made by the Council rather than the Order as proposed to be modified in my interim decision. Accordingly some of the modifications proposed in my interim decision are repeated below.

- In the heading to the Order and in Point 3 on the first page of the Order delete the words " Bridleway No 25 and" and insert the words "Footpath No 25 and Restricted"
- Insert the word "Restricted " before the word "Byway" or "Byways" in the 8th, 10th and 11th line of the first paragraph of the Order
- In Part 1 of the Schedule delete the word "Bridleway" from the heading "Sturton le Steeple Bridleway No. 25" and insert the word "Footpath" and delete the words "the remainder of" from the 4th line of the paragraph under that heading
- In Part 1 of the Schedule insert the word "Restricted" before the word "Byway" wherever it appears
- In Part 11 of the Schedule delete the word "Bridleway" from the heading "Sturton le Steeple Bridleway No. 25" and insert the word "Footpath" and delete the words "the remainder of" from the 6th line of the paragraph under that heading
- In Part 11 of the Schedule insert the word "Restricted" before the word "Byway" wherever it appears
- Delete the word "minimum" before "width of 3 metres" wherever it appears
- On the plan to the Order mark the route between the grid references SK78648306 and SK77238312 as a footpath

34. The proposed modifications would have the effect of showing as highways of one description ways which are shown in the Order as highways of another description. I am therefore 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 regarding the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Alison Lea

Inspector