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## Order Decision

Site visit made on 15 July 2015

**by Alan Beckett BA MSc MIPROW**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 10 August 2015**

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### **Order Ref: FPS/L3055/7/85**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Nottinghamshire County Council (East Stoke Footpath No. 6) Modification Order 2010.
- The Order is dated 12 November 2010 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 was 1 objection 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.**

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### **Procedural Matters**

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

### **The Main Issues**

2. The Order was 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 Order 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 a public right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
3. No evidence of use of the claimed footpath by the public has been submitted in this case. The evidence submitted is drawn from documentary sources and the main issue is whether that documentary evidence demonstrates, on a balance of probabilities that a public right of way on foot subsists over the Order route.

### **Reasons**

#### *East Stoke and Elston Inclosure Award 1801*

4. The Inclosure Commissioners set out a public footway on an alignment which corresponds with the Order route between SK 7381 4959 and the northernmost of the two field boundaries shown on the Order plan. From this point the awarded footway ran in a direct line to the northern end of Ferry Lane (SK 7376 5097).

5. A copy extract of the enabling Inclosure Act was not submitted consequently I am unable to determine whether the Award was made subject to a local Inclosure Act which gave the Commissioners authority to set out new public footpaths or one which incorporated the provisions of the General Inclosure Act 1801 ('the 1801 Act'). Given that the Council argues that the findings of the Court in *R v Secretary of State for Environment ex parte Andrews* [QBD 1993] ('Andrews 1993') does not apply in this case, I consider it highly likely that the award was made pursuant to the provisions of the 1801 Act.
6. The Council submits that the award of a footpath directly across new inclosures demonstrates that the path was in existence before the land was inclosed. However the recent judgement of the Court of Appeal in *R (oao Andrews) v Secretary of State for Environment Food and Rural Affairs (EWCA Civ 669)*<sup>1</sup> held that Inclosure Commissioners acting under the provisions of Section 10 of the 1801 Act did have the power to set out new public footpaths. Irrespective of whether the awarded footpath pre-dated the inclosure or was a wholly new addition to the highway network in East Stoke, the Inclosure award provides conclusive evidence of the existence of public rights on foot at the date of the award.

#### *Ordnance Survey maps*

7. The route used by the public appears to have changed between the date of the Award and the publication of the Ordnance Survey (OS) 6-inch to 1 mile map of 1884 as the 1884 map shows the existence of a path (annotated 'F.P.') on the alignment shown in the Order plan. All subsequent OS maps show the footpath on the alignment shown in the Order plan. It is not known whether the awarded footpath was subject to a formal diversion, but the map evidence suggests that from 1884 at the latest, the route visible on the ground was that shown in the Order.

#### *Finance Act 1910*

8. The Order route crosses five parcels of land which are recorded as being in different ownerships. For hereditament 1 the field book records that '*there are no public footpaths crossing the land*'; the records for hereditament 75 show that a reduction in valuation of £10 was allowed for the existence of a public bridle road; there is no reduction in valuation of hereditament 8 whereas hereditament 6 was reduced in value by £5 due to a public right of way and hereditament 269 was reduced in value by £10.
9. The Finance Act records are therefore not consistent with regard to the land crossed by the Order route being encumbered with public rights at the time of the survey. However, I consider that some weight can be given to the Finance Act records as the field book entries for hereditaments 6 and 269 record that a footpath ran through OS fields 23, 24 and 25; the only route shown on the OS base map as crossing these fields is the Order route.
10. Although the inconsistent approach to the existence of public rights means that the Finance Act records would not be sufficient by themselves to demonstrate the existence of a public right of way, when they are considered with the Inclosure Award evidence, the Finance Act records provides some evidence of the continuing reputation of the Order route as a public right of way.

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<sup>1</sup> The judgement in the Court of Appeal overturns the findings of the High Court in *Andrews [1993]*

### *Parish survey and definitive map records*

11. The Order route was not claimed as a public footpath by East Stoke Parish Meeting as part of the survey of public rights of way under the provisions of the National Parks and Access to the Countryside Act 1949. The parish schedule is accompanied by a letter dated December 1952 from the then Chairman who stated that the three numbered paths shown in the parish map were in regular use and that other paths shown by a dotted line had not been used for at least 30 years and did not serve any useful purpose.
12. The Council submits that the Order route appears to have been one of the paths considered to serve no useful purpose. However, the extract of the parish map submitted does not support that contention as the Order route is not marked by a dotted line as described in the December 1952 letter. The absence of the Order route from the parish schedule suggests that the path had fallen into disuse and had lost its reputation as a public right of way at some point during the first half of the twentieth century.

### **Summary**

13. The objector to the Order submits that the documentary evidence adduced is insufficient to demonstrate the existence of public rights. The objector does not however put forward an alternative analysis of the available documentary evidence nor does he put forward any contrary evidence for consideration.
14. I accept that the documentary evidence is limited in this case. However, the inclosure award provides conclusive evidence of the existence of a public right of way from bridleway 1 to the north end of Ferry Lane although the map evidence suggests that the alignment of that right of way altered at some point in time between 1801 and 1884. The Finance Act records are inconsistent with regard to the Order route but provide some supporting evidence of the reputation of the Order route as a public right of way. Any reputation the Order route had as a public right of way appears to have been lost by the date of the Parish Meeting survey.
15. No evidence has been submitted to demonstrate that the public rights awarded by the Inclosure Commissioners have been formally stopped up. It follows that I conclude that the public right of way awarded in 1801 remains in existence and by 1884 at the latest had come to run on the alignment shown in the Order map. That the path fell into disuse at some point in the twentieth century does not impact upon the existence of the public right awarded during the inclosure process.

### **Other matters**

16. The objector has requested that the northern part of the path be diverted to take the footpath out of the arable field and place it on the riverbank. However, the possible diversion of the path is not a matter which falls within my remit under schedule 15 of the 1981 Act which is limited to determining whether or not a public right of way subsists. The diversion of the right of way is a separate matter to be considered under the provisions of section 119 of the Highways Act 1980 and the objector should approach the Council with regard to the diversion of the path.

**Conclusion**

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

**Formal Decision**

18. I confirm the Order.

*Alan Beckett*

Inspector