

REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)

CONSIDERATION OF APPLICATIONS UNDER SECTION 53(2) OF THE WILDLIFE AND COUNTRYSIDE ACT 1981 TO ADD FOOTPATHS TO THE DEFINITIVE MAP AND STATEMENT IN THE PARISHES OF EAST STOKE AND ELSTON

Purpose of the Report

1. To consider applications made by the Nottinghamshire branch of the Ramblers' Association for the registration of routes as public footpaths on the Definitive Map and Statement for the parishes of East Stoke and Elston. The routes in question are shown on Plan A.
2. The effect of these applications, should a Modification Order to add the routes be made and subsequently confirmed, would be to register:
 - A footpath between Elston Bridleway No. 8 and Cross Lane (Path A);
 - A footpath between Elston Bridleway No. 8 and Path A (Path B);
 - A footpath between Cross Lane and East Stoke Bridleway No. 4 (path C);
 - A footpath between Toad Lane and Cross Lane (Path D);
 - A footpath between Mill Road and Path D (Path E);
 - A footpath between Path D and Elston Bridleway No. 8 (Path F).

Legal Background

3. The applications are made under the provisions of the Wildlife and Countryside Act 1981. Subsection (5) of Section 53 of the Act allows any person to apply to the authority for an order under subsection (2) of the Act, which will make such modifications to the Definitive Map and Statement as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3) of the Act. In this case, the relevant event is the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
4. In order to accept a right of way claim on the basis of discovered evidence, it is not necessary to be able to show that the claimed right exists beyond all reasonable doubt. The tests to be applied are known as 'Test A' and 'Test B.' In 'Test A,' the question to be answered is whether the right of way exists on the balance of probabilities. There must be clear evidence of public rights, with no credible evidence to the contrary. In 'Test B,' the question is whether it is reasonable to allege that a right of way exists on the balance of probabilities. If there is a conflict of evidence, but no incontrovertible evidence that a right of way

cannot be reasonably alleged to exist, 'Test B' is satisfied, the right of way is reasonably alleged to exist, and the claim should therefore be accepted.

The applications and the documentary sources

5. The applications were supported by a range of documentary evidence. The relevant records were examined in order to determine the full extent of the evidence for the existence of public rights over the claimed routes.

Path A

6. In the East Stoke and Elston inclosure Award of 1801, the original route of Path A is set out as part of a public footway from Elston to the lordship of Thorpe, "leading from the lower street of Elston at the south east end thereof in a southeastwardly direction over allotments made to the Trustees of the Poor of Southwell and Gainsborough, the Trustees of the school of Elston, William Rippon, James Penleaze, John Brockton and John Manby, across the Broad Meadow Road..." Broad Meadow Road is now called Cross Lane.
7. In the case of R v Secretary of State for the Environment ex parte Andrews (1993), it was held that the Inclosure (Consolidation) Act of 1801 did not give inclosure commissioners an express power to set out public rights of way on foot. The judgement did not, however, preclude making a claim for a right of way using an inclosure Award from 1801 or later if the route in question could be shown to have originated prior to the date of the Award. In this case, there is no wording in the text referring to Path A to suggest that it was an 'ancient' route predating the Award, but in the text relating to Paths B and E, there is a clear reference to them being parts of an 'ancient' footway. As Path B joins Path A, it can therefore be reasonably presumed that the part of Path A beyond the junction with Path B was also 'ancient,' in which case the Andrews judgement does not bite in relation to this section.
8. With regard to the section of Path A between 'the lower street of Elston' and the junction with Path B, the Andrews judgement does not preclude the establishment of public rights after the date of the Award. It also does not undermine the fact that the Elston commissioners recognised the need to set out a public footway to provide access between Elston and the lordship of Thorpe.
9. On the 6 inch Ordnance Survey map sheet 40 NW, published in 1887, the awarded footway is shown on a slightly different alignment, and now matches the route being claimed as a right of way. The Ordnance Survey path is labelled 'F.P.', and crosses the Car Dyke via a footbridge which is indicated on the map. Although the map sheet includes the disclaimer that the representation of a footpath on the map is 'no evidence of the existence of a right of way,' it does however prove that the claimed path was in existence on the ground by 1887 at the very latest.

10. On the relevant Finance Act map, Path A is shown by a double-pecked line in the same way as other routes known to be public, and is labelled 'F.P.' It has also been annotated in red by an Inland Revenue officer 'Public' in Field 165 and 'Public Path' in Field 174. It first crosses Elston Parcel 62, for which there is a £15 reduction in valuation by virtue of public rights of way over the property. The associated Field Book information reveals that 20 acres of the parcel were crossed by public footpaths, a figure which can only be achieved if the 4 acre Field 140 within Parcel 62, which is crossed by Path A, is included in the calculations.
11. Path A then crosses Parcel 89, for which there is a £3 reduction in valuation. The Field Book entry states that 'A footpath crosses 2 acres', which is the size of Field 165 in Parcel 89, which Path A runs over. It then continues over Parcel 52, which has a £5 reduction. Four acres of the parcel were affected by public footpaths. This figure can only be achieved if the 2 acre Field 166 within Parcel 52, which is crossed by Path A, is included in the calculations. Path A then crosses East Stoke Parcel 14, for which there is a £10 reduction in valuation. Given that the Inland Revenue acknowledged Path A as public, it can reasonably be presumed that part of this reduction was accounted for by Path A. The final section of Path A crosses Elston Parcel 31, for which there is a £10 reduction in valuation. The Field Book entry refers to a footpath affecting Field 174 of 17.108 acres on OS map sheet 40.2, which precisely identifies the field within Parcel 31 which Path A crosses.
12. On the Elston Parish Schedule 6 inch map of 1921, Path A is shown by a double pecked line and is labelled 'F.P.' A footbridge is shown at the point where the path crosses Car Dyke. It was not claimed by the parish as a right of way, although this does not indicate that public rights did not exist. A statement by the Chairman of the Parish Council included in the Schedule indicates that the path had not been used for many years, apparently as a result of the Car Dyke bridge having been washed away in 1947. The Chairman believed that the path was only for the use of farm workers reaching their place of employment, but this is not supported by the documentary evidence, which clearly indicates that the path is a public right of way.
13. On the Definitive Map base published in 1955, Path A is shown by a pecked line in the same way as other routes known to be public rights of way.

Path B

14. In the East Stoke and Elston inclosure Award, Path B is set out as part of a public footway "leading from the upper street of Elston in an eastwardly direction between an ancient homestead marked 16 and a garden marked 17 and then over an allotment made to Sir George Bromley (No. XIV) across Pasture Road into and over part of an allotment made to James Penleaze (No. XLVI) where it meets the last described Road." The "last described Road" is the awarded public footway from Elston to the lordship of Thorpe, which incorporated the original alignment of Path A. The reference in the text to an "ancient homestead" indicates that Path B was part of a route that predated the inclosure Award, in

which case the Andrews judgment does not bite, and Path B can therefore be claimed on the basis of the inclosure Award evidence.

15. Path B is not shown on any other documents, but there is no evidence that it was stopped up between 1801 and the publication of the relevant OS 6 inch map in 1887, and it can therefore be reasonably presumed that it was used during some part of this period as part of a public footway linking the “upper street” area of Elston and the lordship of Thorpe.

Path C

16. In the East Stoke and Elston inclosure Award, the original route of Path C is set out in the Elston section as part of the public footway from Elston to the lordship of Thorpe, “across the Broad Meadow Road and an allotment made to Robert Waring Darwin into the parish of East Stoke.” It continues in the East Stoke section of the Award as “a public footway beginning at an allotment made to Sir George Bromley (No. XLV) thence in an eastwardly direction over an allotment made to Robert Waring Darwin (No. LI) and an allotment made to the Duke of Portland (No. LIVa) to the lordship of Thorpe.” As Path B joins Path A, which is then continued by Path C, it can therefore be reasonably presumed, given that Path B was an ‘ancient’ route predating the Award, that Path C was also ‘ancient,’ in which case the Andrews judgement does not bite, and the inclosure Award evidence in support of the claim for Path C is still valid.
17. On the OS map sheet 40 NW, published in 1887, Path C is now shown on its claimed alignment. On the connecting sheet 40 NE, published in 1891, Path C is also shown on its claimed alignment, and is labelled ‘F.P.’
18. On the relevant Finance Act map, Path C is shown by a double-pecked line in the same way as other routes known to be public, and is labelled ‘F.P.’ It has been annotated in red by an Inland Revenue officer ‘Public Path.’ It first crosses Elston Parcel 79, for which there is no reduction in valuation. Given that the path was clearly acknowledged as a public right of way, the lack of reference to a reduction in the parcel’s valuation can reasonably be accounted for by the fact that the path did not affect the value of the land for agricultural purposes.
19. Path C then crosses Parcel 20, for which there is a £7 reduction in valuation. The relevant Field Book entry states that “the farm is crossed by a public footpath,” and as Path C is labelled ‘Public Path’ on the Finance Act map in the field directly adjoining Meadow Farm, Path C must be the “public footpath” referred to.
20. The adjoining Finance Act map is not available either at Nottinghamshire Archives or at the Public Records Office, but the standard 1900 edition OS 25 inch map shows Path C on the same alignment as on the 6 inch map 40 NE of 1891, as does the 1919 edition 25 inch map, on which it is still labelled ‘F.P.’
21. On the East Stoke and Elston Parish Schedules’ 6 inch maps of 1921 and 1922, Path C is shown by a double-pecked line and is labelled ‘F.P.’ at two points. It was not claimed by either parish as a right of way, although the Chairman of Elston Parish Council stated that it had not been used “for many years now.” He

also believed that it was only a path for farmworkers, but this belief is not supported by the documentary evidence.

Path D

22. In the East Stoke and Elston inclosure Award, Path D is set out as “one public footway leading from an ancient stile at the east corner of an old inclosure called Gall Hall Close, then across allotments made to Richard Nowell, Thomas Jackson, John Fryer and Sir George Bromley to and across an old inclosure marked 10 and thence over and across allotments made to the Trustees of the Poor of Southwell and Gainsborough, George Wakefield, Richard Jackson, Thomas Jackson and William Bromley, across the Broad Meadow Road to old inclosures belonging to William Parkin.” The reference to an “ancient stile” and to “old inclosures” indicates that Path D predated the inclosure Award, in which case the Andrews judgement does not bite and the Award evidence can still be used in support of a right of way claim.
23. On the 6 inch OS map sheet 35 SW, published in 1884, Path D is shown, but not labelled. On the connecting sheet 40 NW, published in 1887, Path D is shown and labelled ‘F.P.’, and crosses the Car Dyke via a footbridge which is indicated on the map.
24. On the relevant Finance Act maps, Path D is shown by a double-pecked line in the same way as other routes known to be public, and is labelled ‘F.P.’ at three points. It has been annotated in red by an Inland Revenue officer ‘public’ at two other points. It first crosses Elston Parcel 51, for which there is a £7 reduction in valuation by virtue of a public right of way over the property. The associated Field Book information reveals that Parcel 51 consists of a single field of 2½ acres, and as the Finance Act map shows that the only path across it was Path D, the £7 reduction for Parcel 51 is another clear acknowledgement that Path D was recognised as a public footpath.
25. Path D then crosses East Stoke Parcel 14, for which there is a £10 reduction in valuation. Given that the Inland Revenue acknowledged Path D as public, it can reasonably be presumed that part of this reduction was accounted for by Path D. Path D then crosses Elston Parcel 52, for which there is a £5 reduction. Four acres of the parcel were affected by public footpaths. This figure can only be achieved if Field 142 within Parcel 52, at slightly under 2 acres and crossed by Path D, is included in the calculations. Path D then continues over Parcel 36, for which there is a £90 reduction. It can reasonably be presumed that part of this reduction was for Path D, given that the Inland Revenue acknowledged that it was a public right of way. Path D then continues over Parcel 83, for which there is a £10 reduction. Part of this reduction can reasonably be presumed to relate to Path D, given the Inland Revenue’s acknowledgement of its public status. Path D then continues over Parcel 62, for which there is a £15 reduction. The Field Book entry reveals that 20 acres of the parcel were affected by public footpaths, a figure which can only be achieved if Fields 182 and 200 within Parcel 62, both of which are crossed by Path D, are included in the calculations. Path D then crosses Parcel 60, for which there is a £10 reduction. The parcel consisted of a single 7 acre field crossed by Path D and no other routes, which is another clear

indication of Path D's acknowledgement as a public footpath. Path D finally crosses Parcel 69, for which there is a £5 reduction. The Field Book entry suggests that Path D did not account for any part of this reduction, but there is nothing unusual in this if Path D was not thought to affect the value of the land for agricultural purposes.

26. On the Elston Parish Schedule 6 inch map of 1921, Path D is shown by double-pecked lines and is labelled 'F.P.' A footbridge is shown at the point where the path crosses Car Dyke. It was not claimed by the parish as a right of way, although this does not indicate that public rights did not exist. The Chairman stated in the Schedule that the path had not been used for many years, apparently as a result of the Car Dyke bridge having been washed away in 1947. He also believed that this was another path only for the use of farmworkers, but this belief is not supported by the documentary evidence.
27. On the Definitive Map base map published in 1955, Path D is shown by a pecked line and is labelled 'F.P.'

Paths E and F

28. In the East Stoke and Elston inclosure Award, Paths E and F are set out as part of the public footway already described in relation to Path B, from "the upper street of Elston" to another awarded footway from Elston into the lordship of Thorpe. The reference in the Award text to an "ancient homestead" indicates that Paths E and F were part of a route that predated the Award, in which case the Andrews judgement does not bite, and the Award evidence in support of the claims for Paths E and F is still valid.
29. On the OS map sheet 40 NW, published in 1887, Paths E and F are shown, and the Path E section of the route is labelled 'F.P.'
30. On the relevant Finance Act map, Paths E and F are shown by double-pecked lines in the same way as other routes known to be public. The Path E section of the route is labelled 'F.P.', and has also been annotated in red by an Inland Revenue officer 'Public.' Path E and F both cross Elston Parcel 36, for which there is a £50 reduction in valuation by virtue of public footpaths over the property. Given that the Inland Revenue acknowledged that Path E was public and that F is clearly a continuation of Path E, it may reasonably be presumed that both paths accounted for part of this reduction.
31. On the Elston Parish Schedule 6 inch map of 1921, Paths E and F are shown by double-pecked lines, and the Path E section of the route is labelled 'F.P.' They were not claimed by the parish as rights of way, although this does not indicate that public rights did not exist. The Chairman stated in the Schedule that the paths had not been used for many years. He also believed that this was another path only for the use of farmworkers, but this belief is again not supported by the documentary evidence.
32. On the Definitive Map base map published in 1955, Paths E and F are shown by a pecked line, and the Path E section of the route is labelled 'F.P.'

Responses from consultees

33. Letters have been sent out to the standard list of consultees, including the local member and the Parish and District Councils, asking for comments or representations regarding the claimed paths. Only one objection was received to the proposals, from Elston Parish Council. Having been supplied with copies of the documentary evidence for the claimed routes, the Parish Council stated that it was opposed to the suggested footpaths, but did not bring forward any counter evidence to suggest that public rights did not exist or could not reasonably be alleged to exist.

Responses from landowners

Paths A and B

34. Savills have objected to Path A as agents to the Southwell and Nottingham Diocesan Board of Finance on the grounds that “There appears to be no justification for a new footpath, particularly as the land is well served by a bridleway ...on Carrgate Lane.” They also state that a footbridge would be required where the path crosses Car Dyke. Due to the nature of rights of way law, neither point is legally relevant to the determination of the claim.

35. Mr John Walker of Thorpe Lodge has objected to Path A on the grounds that he has never been aware of the possible existence of a footpath over the field he farms, and at no time during the past fifty years has anyone walked it. He also objects to the claimed path because of its proximity to the existing right of way along Carrgate Lane. None of these points undermines the weight to be attached to the documentary evidence for public rights over Path A.

36. R. H. Hardstaff and Sons have objected to Path A on the grounds that Carrgate Lane already connects Elston to Cross Lane, and a footbridge costing approximately £10,000 would be needed over Car Dyke, which in their opinion is “a waste of tax payers’ money.” Due to the nature of rights of way law, neither point is legally relevant to the determination of the claim.

37. Mr R. Lockwood has objected on behalf of F. E. Lockwood and Son to paths A and B on the grounds that ‘no public rights of way exist over the farmland,’ any footpaths which may have existed have been extinguished, no paths are shown on the definitive map nor have they been signposted by the County Council, no-one has walked over the affected land for at least the last sixty years, the landowners have not intended to dedicate rights of way to the public as evidenced by the blocking of the routes by mature hedgerows and other permanent obstacles, and F E Lockwood and Son have not been found to be in breach of cross-compliance obligations under the single farm payment scheme to maintain public rights of way over their land. Each one of the points is either not legally relevant to the determination of the claim, due to the nature of rights of way law, or does not undermine the weight to be attached to the documentary evidence for public rights over Paths A and B. There is no evidence that public rights over Path A or Path B have been extinguished by due legal process.

Path C

38. Mr Snowden of Meadow Farm has objected to Path C on the grounds that “local people...do not know of any path existing,” and in any case the land would be “impassable most of the year” because of the inadequate drainage system. He also states that the path would have a detrimental effect on his property, be expensive to establish on the ground, and serve no useful purpose as access is already available via alternative routes. Due to the nature of rights of way law, none of these points casts doubt on the existence of public rights over Path C as revealed by the documentary evidence.

Paths D, E and F

39. Mr Lockwood has objected to Paths D, E and F using the same arguments which have been raised in relation to Paths A and B. These are either not legally relevant, due to the nature of rights of way law, or do not undermine the documentary evidence for public rights. The only additional point raised, with regard to Paths D and E, is that residential properties and a sewage works have been built over the routes of the proposed paths. Mr Lockwood claims that planning permission would not have been granted if public rights of way existed. At the time planning permission would have been at issue, however, the routes in question were not recorded on the Definitive Map as public rights of way, so would not have been considered as a relevant factor in the planning process. Again, due to the nature of rights of way law, the granting of planning permission does not therefore demonstrate that public rights of way do not exist over routes D and E.

Conclusion

40. In order to accept the claims, it is necessary to satisfy either ‘Test A’ or ‘Test B,’ as described above. Whilst the authority is aware of the Parish Council’s and the landowners’ concerns, there is clear evidence of public footpath rights over all of the claimed routes, and, due to the nature of rights of way law, no credible evidence to the contrary. There is clear evidence of public footpath rights over all of the claimed routes and no credible evidence to the contrary. ‘Test A’ is therefore satisfied, and the claims should be accepted and a Modification Order made accordingly.

Statutory and Policy Implications

41. This report has been compiled after consideration of implications in respect of finance, equal opportunities, human resources, crime and disorder, human rights, the safeguarding of children, sustainability and the environment and those using the service and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

RECOMMENDATION/S

1) It is RECOMMENDED that the Committee accepts the claim for Path A and authorises the making of a Modification Order to register the route as a public footpath, as for the reasons set out above, the evidence demonstrates that public footpath rights exist on the balance of probabilities.

2) It is RECOMMENDED that for the same reasons, the Committee accepts the claim for Path B and authorises the making of a Modification Order to register the route as a public footpath.

3) It is RECOMMENDED that for the same reasons, the Committee accepts the claim for Path C and authorises the making of a Modification Order to register the route as a public footpath.

4) It is RECOMMENDED that for the same reasons, the Committee accepts the claim for Path D and authorises the making of a Modification Order to register the route as a public footpath.

5) It is RECOMMENDED that for the same reasons, the Committee accepts the claim for Path E and authorises the making of a Modification Order to register the route as a public footpath.

6) It is RECOMMENDED that for the same reasons, the Committee accepts the claim for Path F and authorises the making of a Modification Order to register the route as a public footpath.

Tim Hart
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For any enquiries about this report please contact: Tim Hart on 0115 977 4395

Constitutional Comments [SJE – 07/12/12]

42. This decision falls within the terms of reference of the Rights of Way Committee to whom the exercise of the Authority's powers relating to public rights of way has been delegated.

Financial Comments [DJK – 12/12/12]

43. The contents of this report are duly noted; there are no financial implications.

Background Papers

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

Footpath claims at East Stoke/Elston – case file.

Electoral Division(s) and Member(s) Affected

Farndon and Muskham Councillor Sue Saddington

ROW 88 East Stoke and Elston
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