



REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)

SELSTON FOOTPATH NO.72 - EXTINGUISHMENT

Purpose of the Report

1. To update Members on the making of an Order to extinguish Selston Footpath No.72 in accordance with the decision of Committee on 22nd June 2011, and to consider whether the opposed Order should now be referred to the Secretary of State for Environment Food and Rural Affairs for determination, or whether action should be taken to clear the definitive legal path alignment so that it is available for public use.

The Law

2. Section 118(1) of the Highways Act 1980 (HA80) enables this Council to make an Order to extinguish a footpath when it appears expedient to do so on the ground that it is not needed for public use. This was the subject of the 22nd June 2011 report to Committee which decided that the test was met and that an extinguishment order should be made. An extinguishment order only takes effect if it is confirmed, and where objections are made and not withdrawn, the Order can only be confirmed by the Secretary of State.
3. Unlike modification orders which must be referred to the Secretary of State if opposed, it is a discretionary matter whether or not this Council chooses to refer an opposed Extinguishment Order i.e. it may, having regard to the information before it, resolve to no longer pursue confirmation of the Order and to therefore retain the public footpath.
4. An order can only be confirmed by the Secretary of State if he (or an appointed Inspector) is satisfied that it is 'expedient' to extinguish the path having regard to;
 - The extent to which the path would be likely to be used by the public
 - The effect the extinguishment would have on land served by the path (bearing in mind that compensation is payable to those who suffer loss as a result of the extinguishment).
5. Under HA80 section 118(6) any temporary circumstances preventing or diminishing the use of the path by the public must be disregarded when confirming an Extinguishment Order.

Information and Advice

6. The Nottinghamshire County Council Rights of Way Improvement Plan 2007-2012, states 'The County Council will not support extinguishment orders unless there is very strong evidence that the route is not needed for public use'. This reflects the test applied during Committee's consideration of the extinguishment proposal on 22nd June 2011.
7. The footpath proposed to be extinguished runs from the end of Inkerman Street (a cul-de-sac), through the garden of No.20 Inkerman Street and along a fenced unregistered strip of land between No.113 Inkerman Road and St Michaels View. A plan showing the location of the footpath is shown as Appendix A. A series of photographs taken along the path are shown as Photos B-F. Photos B and D show some obstructions observed on a site visit in May 2012. The legal line of the footpath runs partially within the hedge line and through a garden shed. As can be seen (Photo C), the current available route runs along the path between the house and the shed.
8. The footpath was the subject of a Modification Order Application made in 1999. Although this application was turned down, the County Council was subsequently directed to make an Order following an appeal by the applicant to the Secretary of State. A public inquiry was duly held in September 2007 where the County Council objected to the Order. After hearing all the evidence, the appointed Inspector concluded that the right of way did in fact exist and the Order was confirmed.
9. In December 2007 shortly after the path was confirmed, Selston Parish Council requested the footpath be extinguished on grounds that the footpath did not serve any useful purpose and that it might also contribute towards an increase in anti-social behaviour.
10. In February 2010 the Parish Council conducted a survey among 130 local households seeking opinion regarding use of the path. From the 80 responses received 74 households said they would prefer the path to be closed.
11. The County Council carried out consultation on the matter in October 2010 and a report was duly taken to Committee in June 2011 where it was decided that an Extinguishment Order should be made to extinguish the path.
12. Following the making and advertising of the Order the County Council received seven objections, one representation and one letter in support of the Order. This report does not give an exhaustive summary of all the points raised, but does set out the main issues.
13. One objector, a resident of Inkerman Street, claims to currently use the route as a short cut and also states that the path is used by other residents and "members of the local public". The objector believes the path is not used more regularly because obstructions "give the impression that the path is no longer walkable". Reference is also made to retaining the footpath due to it being an ancient right of way which the objector believes ought to be protected for the use of future generations.
14. An objection was received from another resident of Inkerman Street who claims to use the footpath on a fortnightly basis for access to a bus-stop on Nottingham Road. Again, reference is made to retaining the footpath due to its historic nature for use by "future residents and walkers".

15. An objection from a resident of Mansfield states;

- There is no evidence that the required test 'not needed for public use' has been met.
- The survey carried out by Selston Parish Council in 2010 was flawed.
- The path is 200 years old and is part of Selston's heritage.
- The County Council has encouraged illegal obstructions on the right of way.
- The lack of a recognisable footpath gives walkers the impression that they are trespassing on private property.
- Many Rambler Clubs wish to walk the footpath.
- The path should be restored to its historic width of 3 metres.
- The path provides a safe alternative route avoiding a bend on Inkerman Road which does not have a footway.

16. An objection from the Sutton in Ashfield and District Rambling Club states;

- The County Council has not monitored use of the path in order to establish whether the path is needed for public use.
- Infrequent use is not sufficient reason to extinguish the footpath.
- The footpath is under used because it is overgrown with vegetation, badly maintained and obstructed.
- The footpath has been deliberately obstructed to give the impression that there is no way through. Walkers have been reluctant to exercise their right of way.
- There is insufficient reason to extinguish the footpath.
- The footpath is incorrectly recorded on current Ordnance Survey maps therefore walking groups rarely use the route.
- The extinguishment only benefits the owners of No.20 Inkerman Street and No.113 Inkerman Road who have been allowed to obstruct the footpath.

17. An objection from the Nottinghamshire Area Ramblers Association states;

- The Ramblers Association can provide evidence of the path being used following the public inquiry in 2007.
- The County Council has allowed development to take place on the path by allowing it to run through a residential garden instead of a defined alleyway.
- The path is not shown on published Ordnance Survey maps so the public may be unaware of it.
- The route is not available on its definitive line due to encroachment by a shed, a conifer hedge and fencing at the rear of St. Michael's View. The path should be made available on the definitive alignment by forming an alleyway.
- The path is needed because it provides a safe route from Inkerman Road to Alma Street.
- The path has never been made available to less abled/disabled users.
- The case of R v Secretary of State for the Environment ex parte Stewart (1980) is applicable.

18. An objection from the Nottinghamshire Footpaths Preservation Society states;

- The County Council is in breach of its statutory obligations to enforce the definitive alignment.
 - The path is obstructed by a garden shed, by the incursion of a leylandii hedge and by a fence on the southern end of the path.
 - The lack of a demarked path intimidates walkers when passing through a private garden.
 - As a result of the above, the County Council cannot demonstrate that the path is not needed for public use.
 - The path provides a useful local short cut and potentially provides a link to other footpaths in the vicinity.
19. A representation was also received from a resident of St. Michaels View stating the footpath contains Japanese Knotweed (which is currently being controlled by the County Council) and that landowners should give written assurances to continue with this treatment if the path is extinguished.
20. A letter in support of the extinguishment was received from Selston Parish Council stating;
- The Parish Council are of the opinion that the current path has no value.
 - The Parish Council does not believe that there is a need for this path in the future.
 - Enquiries among those residents most likely to use the path revealed most have not used this path nor would do so in the future. Most residents did not feel the path should be maintained at public expense.

Comments on the objections

21. One point often referred to by objectors relates to temporary obstructions along the path, namely a leylandii hedge, a shed, and a fence. These issues were previously addressed in a report to the Rights of Way Committee in September 2010 at which it was resolved to temporarily manage the footpath on the currently available non-definitive alignment (i.e. alongside the hedge and around the shed). That report recommended that the definitive line of the path should not be strictly enforced until the matter of extinguishment was finally concluded. It should be noted however that there is no evidence to support allegations that the fence at the rear of the properties on St. Michaels View obstructs the definitive footpath in any way.
22. Items such as ornamental trees, garden furniture/pot plants have been positioned on the path within the gardens of No.20 Inkerman Street, and it is argued by some objectors that these items have made the route difficult to discern at times and give the impression among users that no public footpath exists through the private garden.
23. Some objectors refer to the antiquity of the footpath which was recorded in the Selston Tithe Award of 1843. However there is nothing within the tithe award to suggest that the width of the footpath was ever 3 metres wide as alleged by some objectors. The Inspector at the Public Inquiry in 2007 concluded that the public right of way was only 1 metre wide and that the 3 metre width actually relates to a private road/track which existed in the 1800s/1900s, and not to the physical extent of the public right of way.

24. Reference is made to Selston Footpath No.72 providing a safe alternative route by avoiding a 'dangerous' blind bend on the corner of Inkerman Road. In March this year a new footway was constructed on the bend thereby resolving this safety issue.
25. The objection submitted by the Ramblers Association refers to the case of *R v Secretary of State for the Environment ex parte Stewart [1980]* which examined the wording in relation to extinguishment orders. The judge in that case stated that obstructions on a path should be considered as being 'temporary circumstances' if steps can lawfully be taken to remove them. Accordingly all of the aforementioned items such as the hedge, the shed, shrubs, garden furniture/pot plants should be regarded as temporary circumstances as the County Council can take steps for them to be removed under Highway Act powers. Accordingly these obstructions cannot themselves be regarded as grounds for stopping up the footpath.
26. The Ramblers Association's objection goes on to quote the judge who said 'It seems to me that it would be quite intolerable in the case of an admitted highway in the form of a public path for it to be accepted as a good ground for stopping it up that encroachments and obstructions have made it difficult to say precisely to within a yard or so where it ran'. It appears from the *Stewart* case that the judge was referring to some uncertainty regarding the precise location of the Definitive Footpath, and although that is not the case here, it is important to note that extinguishments must not be made simply to remedy a situation where obstructions have made the path difficult to use or discern.
27. The Ramblers Association also state that the County Council has 'allowed development' to take place on the path as it runs through a residential garden rather than it being on a defined alleyway. However the footpath is not actually obstructed by the development itself nor is there any impediment to prevent rights of way existing through private gardens.
28. The Ramblers Association have referred to non-availability of the path for less abled/disabled users. At a site meeting with the original applicant in 2010 it was agreed that the condition of the path was generally acceptable and available to users. However officers will continue to monitor the path and when appropriate ensure the removal of any illegal structures which pose problems to those with limited mobility or disability.
29. In respect of the Ramblers Association's claim to hold additional user evidence, requests have been made for this information to be submitted to the County Council. However no further evidence has been submitted and therefore officers have been unable to consider such information.
30. Some objectors refer to the footpath being incorrectly depicted on current Ordnance Survey maps. This appears to be correct and therefore steps have been taken to request that Ordnance Survey rectify this. It is always possible that this error may have caused confusion among some walkers unfamiliar within the locality, however the Countryside Access Team has not received any reports of such occurrences.
31. Japanese Knotweed has been confirmed as growing on the fenced southern section of footpath (Photo F). This plant is an invasive species subject to certain controls under the Wildlife and Countryside Act 1981. Its presence can constitute a private nuisance to neighbouring properties and therefore the County Council is currently undertaking the prescribed regime of treatment to control its spread. The primary consideration of the Authority in this matter however is one of public use of the route. Should the route be

extinguished, responsibility for this matter would revert to the owners of the land. Contrary to the objector's request, the Authority is not required to obtain assurances in regard of further treatment if the path is extinguished.

32. Selston Parish Council has re-iterated its view that the footpath should be stopped up because it is considered to have no value as a right of way. This view conflicts the objectors who wish to see the footpath retained.
33. As a general point, one of the main grounds of objection relates to whether the legal test 'not needed for public use' has been met. Evidence from two local residents suggests that the path is personally used by them, while three walking groups refer to the continuing need for the path. This test of 'need', however, was considered at the time of Committee's earlier decision to make the extinguishment order, and is not a relevant consideration for confirmation of the order.

Reason/s for Recommendation/s

34. At this present stage, the decision before the Committee is discretionary. It is for the Committee to determine whether they wish to refer the Order to the Secretary of State (requesting that the Order be confirmed), or alternatively, having considered the objections set out in this report, decide not to refer the Order.
35. The situation is very finely balanced, as it appears that the path is currently used but only to a limited extent. It could therefore be concluded that actual use is so small that the path is not actually needed. If the Order were to be referred to the Secretary of State it is suggested that this should be based on the expediency test set out in paragraph 4. This may entail holding a local public inquiry to hear the case for or against the expediency of extinguishing the footpath.
36. If Committee decide not to refer the Order, it should then consider authorising officers to seek the removal of temporary obstructions such as removal or cutting back the leylandii hedge (Photo B), removal of specimen tree to the front of No.20 Inkerman Street (Photo B), removal of the garden shed (Photo C), and the removal of any garden furniture/pot plants (Photo D).

Statutory and Policy Implications

37. 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

It is recommended that Committee resolve either:

a) that the Order to extinguish Selston Footpath No.72 be referred to the Secretary of State for determination on the basis that having considered the evidence before the Authority, the Authority is satisfied that it is expedient to confirm the Order.

or

b) not to seek confirmation of the Order, and therefore retain the public footpath and authorise officers to obtain the removal of temporary obstructions along the definitive legal line of the path.

Eddie Brennan
Definitive Map Officer

For any enquiries about this report please contact: Eddie Brennan (0115 9774709)

Constitutional Comments (SJE – 19/09/2012)

38. 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 06.09.12)

39. 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.

- Selston Footpath No.72 office files

Electoral Division(s) and Member(s) Affected

Selston Councillor Gail Turner

ROW85
20.9.12