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## Order Decision

Unaccompanied site visit made on 19 August 2015

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 9 September 2015**

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### **Order Ref: FPS/L3055/7/88**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Nottinghamshire County Council (Hickling Footpath Nos. 22 and 23) Modification Order 2012.
- The Order is dated 1 June 2012 and proposes to modify the Definitive Map and Statement for the area by adding two footpaths as shown in the Order plan and described in the Order Schedule.
- There were 5 objections outstanding when Nottinghamshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

### **Summary of Decision: The Order is not confirmed**

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#### **Procedural Matters**

1. This case concerns the addition of two footpaths at Mill Lane, Hickling forming a continuous route along Mill Lane from its junction with Main Street. The case relies on the interpretation of historical documentary evidence, and in particular the Finance Act 1910 valuation map. For ease, I shall refer to the Order route as Mill Lane in this decision.

#### ***The Order***

2. There appears to be some confusion in the submissions that a path to the west of Mill Lane crossing farmland to join an existing right of way forms part of the Order. By reference to the Schedules to the Order and the Order plan, however, it can be seen that the Order route terminates at the western end of Mill Lane.
3. In examining the Order plan and Schedules I note that both the western and eastern ends of Mill Lane are given the same grid reference (SK 6845 2930). This is an error that can be corrected by modification if the Order is confirmed and, given that Mill Lane can otherwise be easily identified, does not in my view prejudice anyone's interests.
4. In addition to the 5 statutory objections submitted to Nottinghamshire County Council ('the Council'), a representation was received from Hickling Parish Council expressing support for those objecting to the Order. A further 3 interested parties registered their opposition to the Order during the exchange of statements under the written representations procedure.

#### ***Discovery of evidence***

5. It is argued that the Council has not discovered evidence, but is reconsidering evidence previously available. Section 53(3)(c) of the Wildlife and Countryside Act 1981 ('the 1981 Act') requires the discovery of evidence to trigger the making of an order. It is not known what (or whether) documentary evidence has been considered in the past in relation to Mill Lane. Nevertheless, I am satisfied, as the Council points out, that the Finance Act evidence was not available when Hickling Parish Council completed its claim in 1952 under the 1949 National Parks and Access to the Countryside Act ('the 1949 Act'). Neither was it available to the Council when it prepared the Definitive Map and Statement ('DMS'): it was published in 1965 and the Finance Act records were not publicly available until 1968. I conclude there has been a discovery of evidence and that it is appropriate that, in reaching my decision, I consider this together with all the other evidence available.
6. Given their understanding of the case, Mark and Jane Fraser opposing the Order express surprise that other documentary evidence has been referred to by the Council in its submissions, in addition to the Finance Act evidence. The Council has confirmed that the Finance Act map is the primary evidence in this case. As mentioned above, I shall consider all relevant evidence available to me.

### ***Notice of the Order***

7. Concerns are expressed that the Council did not consult adjoining landowners/occupiers prior to making the Order. Schedule 15 to the 1981 Act requires that notice be served on every owner and occupier of the land to which the Order relates; however, there is no statutory requirement that adjoining owners and occupiers be similarly served notice. I understand from the submissions that there is no known owner/occupier of Mill Lane.
8. In addition, notice is required to be served in a local newspaper circulating in the area to which the Order relates, and notices are also required to be displayed prominently at either end of the way affected by the Order. The Council confirms that the necessary consultations and requirements regarding notice of the Order were carried out. There is nothing to suggest that the Council failed to adhere to the statutory requirements, although photographs provided by the Objectors show that when they were taken, the notice at the eastern end of Mill Lane was largely obscured by vegetation.

### **The Main Issues**

9. The Order has been made by the Council under Section 53(3)(c)(i) of the 1981 Act. I must consider whether the evidence discovered, when considered with all other relevant evidence available, is sufficient to show that the footpaths subsist, and that the DMS require modification.
10. In reaching my decision, which I make on a balance of probability, I take into account relevant case law.

### **Reasons**

#### ***Inclosure Award***

11. The 1776 Hickling Inclosure Award set out Mill Lane as "a private horse carriage and drift road" for use by a named allotment holder and by several other owners and occupiers of allotments which the awarded road crossed or

abutted. The wording, the Council says, suggests the awarded road would only be used by a limited number of owners/occupiers.

12. There is a windmill on land north-west of the awarded road, at the end of Mill Lane<sup>1</sup> the presence of which the Council believes may have contributed to the route's name. They presume that anyone in the village needing to have grain ground into flour would have used Mill Lane on foot or with a horse and cart, and such use could easily have resulted in public rights becoming established. The Objectors refer to another mill in the village (on Clawson Lane) that would have been available to Hickling residents. They suggest the mill on Mill Lane was associated with nearby Kinoulton by way of the footpath network to the west, evident on Ordnance Survey ('OS') mapping, which I consider next.

### ***OS mapping***

13. OS maps were produced to record topographical features, the practice being to show paths whether or not they were public or private. From 1883, paths were annotated 'FP' on large scale maps, but from 1888 OS maps carried a disclaimer to the effect that the representation of a track or way on the maps was not evidence of the existence of a public right of way.
14. Mill Lane is named on the map extracts provided. At the western end of Mill Lane double pecked lines head west to join a north-south route between Bridegate Lane, Hickling (to the south) and the village of Kinoulton (to the north). The latter is marked 'F.P.' or footpath on an 1884 OS map extract. The windmill is shown to the north of the double pecked line where it meets Mill Lane, and is described as a flour mill.
15. The Council suggests this link between Mill Lane and the footpath to Kinoulton, means Mill Lane must have enjoyed footpath rights. The link is recorded on a 1920 OS map, even though the windmill is no longer annotated by this time. They suggest Mill Lane would have been used by the public as part of a longer route to Kinoulton, the location of a popular spa well from the late 18<sup>th</sup> century, via this link and via Footpath No.14, as well as to a public house at Hickling Pasture, and to Widmerpool Station. The Objectors, on the other hand, suggest the canal towpath as a logical route for Hickling residents to reach Kinoulton; although whether it then enjoyed a public right of access has not been clarified. They point out there were public houses in Hickling (although they do not say where) and it was equally likely that people went by horse and cart to the station. The footpath network evident on the OS mapping is a north-south one, avoiding Hickling. It is possible that such routes linked with the windmill, but may not have extended along the length of Mill Lane.

### ***Finance Act Map***

16. The 1910 Act provided for the levying of a tax on the incremental value of land. In calculating the 'assessable site value' of land it allowed for deductions to cover such things as public rights of way and easements, should the land be sold. These were reflected in the records either by references to public rights of way in the documents forming the evaluation process, or the exclusion of a route from assessable land parcels or hereditaments marked on an OS base map. Where a route shown on the OS base map is both uncoloured and unnumbered, and excluded from the hereditaments, there is a strong

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<sup>1</sup> A plot of land "being a piece of ground whereon is a windmill erected"

- possibility that it was a public highway, especially if it corresponds to a known public highway (usually vehicular).
17. Mill Lane is excluded from adjoining landholdings on the 1910 valuation map, as is Main Street to which it connects. The Council points out that Main Street is indisputably a public road, and having regard to the judgement in *Agombar*<sup>2</sup>, concludes Mill Lane was accepted as a public road at the time, thus establishing the existence of at least a public right of way on foot.
  18. The Objectors place reliance on pecked lines marked on the map along Main Street, and their absence from Mill Lane, as evidence that there was no public footpath along the Order route. These pecked lines, however, are features mapped on the base map and reflect features that the OS surveyors saw on the ground. They may represent a footpath or footway, or some other feature that it was appropriate be recorded.
  19. The Council has not expanded upon their reliance on the *Agombar* judgement, nor provided a copy of it. However, it held that a route excluded from the taxable land hereditament was “most material evidence in relation to the status of [the lane] at the time”. The Objectors consider there are differences between Mill Lane and the route that was the subject of the *Agombar* case. They also point to an order decision in which the Council argued the exclusion of the route in question related to the need for private access to many different landholdings rather than as an indication of public rights<sup>3</sup>.
  20. That Mill Lane is shown on the Finance Act map as a public highway is, the Council maintains, the only logical interpretation of this evidence given that there is a footpath to Kinoulton just east of the windmill site to which there would be no access if there were no public rights along Mill Lane. Its depiction can be attributed to it being publicly maintained in connection with access to the windmill. However, no evidence is provided as regards public maintenance.
  21. According to the Objectors, the windmill fell into disrepair and was demolished in 1908 before the Finance Act assessment was undertaken, although no evidence of this has been provided. However, it seems it was not operating by 1920 as evidenced by the OS map (paragraph 15).

### ***Definitive Map records***

22. A route to the west of Mill Lane and another that crosses Mill Lane were subsequently recorded as public rights of way and added to the DMS, as evidenced by the extract of the Definitive Map provided (for the parish of Hickling as Footpath Nos. 8 and 14). Footpath No.8 was claimed by the Parish Council for inclusion in the DMS under the 1949 Act as path 4, commencing on Bridegate Lane. It is not clear to me how Footpath No.14 (which connects to the south with Footpath No.8 and Bridegate Lane) came to be included in the DMS: it is not marked on the Hickling Parish Council claim map and there is no schedule for it. However, the link between the end of Mill Lane and the north-south route to the west was not claimed and does not appear on the Definitive Map extract provided.
23. Mill Lane itself was not claimed by the Parish Council, although the Council says this is not unusual as nearby Long Lane was likewise omitted but footpath

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<sup>2</sup> Robinson Webster (Holdings) Ltd v Agombar [2001] EWHC 510

<sup>3</sup> Order Decision FPS/L3055/7/62

rights were later claimed and it was added to the DMS. An examination by them of parish schedules reveals that many omitted double hedged lanes such as Mill Lane which, they say, were so obviously public that it was not thought necessary to claim them.

**Other evidence**

24. Land Registry searches over several decades in connection with the purchase of properties have revealed no public right of way, although that is not unusual if none is recorded in the DMS.
25. Some of the letters of objection refer to infrequent informal use of Mill Lane mostly by villagers, and of use made by those accessing properties and/or land alongside the Order route.

**Conclusions on the evidence**

26. I find the evidence points to Mill Lane coming into existence when awarded in 1776. The wording of the Inclosure Award suggests it was intended for use by a limited number of owners and occupiers to access their fields, who would be exercising a private right. Nevertheless, this would not prevent public rights on foot being acquired subsequently.
27. The wording of the Award suggests the windmill pre-existed it. However, no evidence has been provided about the mill that would assist in establishing a public status for Mill Lane at the time of inclosure or subsequently.
28. It is possible the public on foot used the routes connecting with and to the west of Mill Lane, which were marked as footpaths on the OS maps, along with Mill Lane, to access other nearby villages and facilities. However, if the Council is correct, then I would have expected that the link path at the end of Mill Lane to present day Footpath No.8 would have been claimed in the 1950s, even if, as the Council asserts, the Parish Council considered Mill Lane did not need to be claimed for inclusion in the DMS as it was thought to be part of the road network.
29. As the Objectors argue, it is equally possible that the Parish Council did not regard Mill Lane as a public right of way. In my view, this is a more probable explanation in this case given that it and the link path at its western end were not claimed for inclusion in the DMS. The route now recorded as Footpath No.14 is shown on the Definitive Map crossing Mill Lane rather than connecting to one or other side of it. This tends to suggest it was a north-south route rather than one connecting with and giving public access on foot to and along Mill Lane, and with Kinoulton to the north. Therefore, it would not have been dependent on there being a public right of way on foot along Mill Lane as the Council claims (paragraph 20). I consider this adds further weight to Mill Lane not being regarded by local people as a public footpath. Accordingly, I am not convinced that Mill Lane was considered "so obviously public" as the Council suggests, when the DMS was being drawn up.
30. There is no explanation of the evidence which led to Long Lane being added to the DMS and it is by no means clear that the circumstances are comparable. That other routes in the Parish are now recorded in the DMS is not evidence that Mill Lane is public.

31. Turning finally to the Finance Act evidence on which the Council primarily relies, I do not share their view that the only possible conclusion to be drawn from the Finance Act map is that Mill Lane was accepted as being a public road when it was drawn up, thus establishing at least a public right of way on foot. There may be other reasons for the exclusion of a route. One such reason is where a private road set out in an inclosure award for the use of a number of people, but without its ownership being assigned to any individual, is excluded from hereditaments. Such an interpretation in this case is consistent with the evidence that Mill Lane was set out in 1776 for access by landowners and occupiers to otherwise landlocked fields. That this is its overall purpose and use, is a view held by objectors who use and access Mill Lane to reach their land. There is no known landowner of Mill Lane.
32. The Council does not consider that credible contrary evidence has been submitted to counter their interpretation of the evidence they have discovered. However, whilst there may be evidence sufficient in nature to raise a reasonable allegation that a public right of way subsists, the test that must be satisfied for me to confirm the Order is that a public right of way subsists. In my view the historic documentary evidence in this case is insufficient for me to reach such a conclusion. There is insufficient evidence of claimed use by the public available from which any conclusions can be drawn. It follows that the Order should not be confirmed.

### **Other matters**

33. Safety and suitability concerns were raised by some of those objecting to the Order. In addition, those living or accessing land alongside Mill Lane are concerned about the effect of the Order, if confirmed, on their interests. Whilst I understand the importance of such concerns to those affected, they are not ones that I can take into account in my consideration of the Order under the 1981 Act, and I have not done so. My determination must be based on the existence or otherwise of a public right of way over the Order route.
34. Concerns about how the Council has dealt with the Order are not matters for me.

### **Conclusion**

35. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

### **Formal Decision**

36. I do not confirm the Order.

*S Doran*

**Inspector**