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## Order Decision

Inquiry opened on 8 September 2015

Site visit made on 9 September 2015

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 26 October 2015**

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### **Order Ref: FPS/L3055/7/76**

- 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 (Burton Joyce Footpath No. 17 and Stoke Bardolph Footpath No. 6) Modification Order 2013.
- The Order is dated 1 February 2013 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 at the commencement of the inquiry.

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

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### **Procedural Matters**

1. I opened a public local inquiry into the Order at the Village Hall, Stoke Lane, Stoke Bardolph on Tuesday 8 September 2015, having made an unaccompanied inspection of the Order route on the previous afternoon. Following the close of the inquiry on Wednesday 9 September I made a further inspection of the route in question in the company of the representatives of the Ramblers' Association (RA) (the applicant for the Order), Network Rail (the objector), Nottinghamshire County Council and Severn Trent Water.
2. In 2006 the RA made an application to add the footpath to the definitive map and statement. The Council determined not to make the Order and were directed to do by the Secretary of State following a successful appeal. At the inquiry, the Council adopted a neutral stance and the case for the confirmation of the Order was presented by Mr Thompson of the local branch of the RA.

### **The Main Issues**

3. The Order is made under section 53 (3) (b) of the 1981 Act following the expiration of a period such that the enjoyment of the way during that period by the public raises a presumption that the way has been dedicated as a public path.
4. The RA relied upon evidence of use by the public of the claimed footpath to demonstrate that dedication of a public right of way could be deemed to have occurred. In a case where there is evidence of claimed use of a way by the public, the provisions of section 31 of the Highways Act 1980 (the 1980 Act) are relevant. Section 31 provides that where a way, other than a way of such character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no

intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, whether by a notice or otherwise.

5. In objecting to the Order, it was Network Rail's case that at all material times, Network Rail had no capacity to dedicate a public right of way over Zulus Crossing as to do so would be incompatible with the safe and efficient running of the railway; dedication of a public right of way could not be presumed under section 31 (1) of the 1980 Act as there was no capacity to dedicate. Furthermore, it was Network Rail's case that there had been no intention to dedicate such a way and that any use which had been made of the crossing by the public had not been 'as of right' and without interruption.

## **Reasons**

### ***Whether there is a way of such a character that use of it could not give rise at common law to a presumption of dedication***

6. The claimed footpath runs from Burton Road over agricultural fields, crosses the live rails of the Nottingham – Newark railway and then runs south along an access track within Severn Trent's agricultural estate to meet Stoke Bardolph footpath 1.
7. Network Rail submits that it has no capacity to dedicate a new public right of way on the level and that incapacity is derived from three separate sources. First, the dedication of a public right of way is inconsistent with its obligations to operate a safe and efficient railway network. Secondly, the Licence under which Network Rail operates the railway network does not allow it to sanction a use of the railway which amounts to misuse and which would import an unacceptable level of risk to users. Finally, section 55 of the British Transport Commission Act 1949 makes it a criminal offence for the public to use railway land in the manner claimed.
8. The RA submit that for the purposes of the statutory scheme there is no requirement for the applicants to demonstrate that there was anyone with the legal capacity to dedicate. The RA says that the purpose of section 1(2) of the Rights of Way Act 1932 was to eradicate the need for capacity to be demonstrated once use had been established for a period of 40 years. That specific section was repealed under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) so that since the coming into operation of the 1949 Act a way can be deemed to have been dedicated irrespective of whether there was a person or body with the capacity to dedicate.
9. However, for the statutory scheme to be engaged in the first place, the clause '*whether the way is of such a character that use of it could not give rise at common law to a presumption of dedication*' must be addressed. At common law, there remains a requirement for the person or body against whom dedication is inferred to have the capacity to dedicate. Whilst section 1 of the Rights of Way Act 1932 established a statutory framework whereby the capacity to dedicate requirements could be dispensed with following a necessary period of use, the common law principle involving the capacity to dedicate remains relevant in certain circumstances. If Network Rail does not have the capacity to dedicate a public right of way over its operational land either because such a dedication would be inconsistent with its statutory duties or because it could not authorise use which would otherwise be criminal, a

public right of way could not come into being at common law or under the statutory scheme.

10. Network Rail drew support from the case of *British Transport Commission v Westmoreland County Council* [1958] (the *Westmoreland case*). As contested by Network Rail, this case established a number of principles.

- (i) A statutory undertaker (such as Network Rail) cannot voluntarily release or otherwise abandon a statutory power that has been conferred upon it by special Act of Parliament and that concerns the manner in which that statutory undertaker may permissibly deal with land acquired for the purposes of that Act;
- (ii) A statutory undertaker cannot, in the absence of an express statutory power, grant any easement over land acquired for the purposes of its special Act if the existence of such an easement – in any possible circumstances and at any future time – would undermine the statutory undertaker’s satisfaction of the purposes of the special Act;
- (iii) a statutory company has no power to grant a public right of way where the enjoyment thereof by the public *is incompatible* with the statutory objects of the company; and
- (iv) for the purposes of adjudging *incompatibility*, it is a question of fact whether, at the date when the question is considered by a tribunal of fact, that there is any likelihood that the existence of an alleged right of way would interfere with the adequate and efficient discharge of the undertaker’s statutory duty.

11. In the *Westmoreland case*, the route at issue ran over a bridge spanning the railway; the court found that the existence of the bridge did not endanger the running of trains upon the lines. In that case, statutory incompatibility did not arise, nor did the issue of criminal trespass under section 55 of the British Transport Commission Act 1949 (BTCA). The question of incompatibility is therefore a question of fact in each case. The circumstances in the *Westmoreland case* are different from that at Zulus Crossing where it is claimed a public right of way has come into existence crossing the live rails of the railway on the level.

12. Mr Jones’s evidence was that an assessment had been made of the risk to users of the crossing using Networks Rail’s ALCRM model. The assessment gave the crossing a score of C6, which reflected the number of vehicular traverses by the private rights holder against the number and speed of the trains passing over the crossing. The risk assessment did not take into account public use of the crossing as there was no empirical data for public use of the crossing to insert into the model.

13. A covert camera installed at Zulus Crossing for a period of 9 days in August 2015 had revealed around 60 crossings of the tracks by members of the public. The photographs showed single pedestrians crossing the railway, cyclists, dog walkers and families with small children and / or pushchairs. In Mr Jones’ view, those members of the public encumbered with children, dogs or other

- accompaniments placed themselves at greater risk in crossing the railway as their primary attention may not be upon looking and listening for approaching trains. Factoring in 20 pedestrian crossings per day into the ALCRM model raised the crossing risk assessment to C5. Based on the ALCRM model, it was Mr Jones' view that public use of Zulus Crossing increased the level of risk to crossing users and train passengers with a corresponding reduction in safety at the crossing.
14. Mr Greenwood's evidence was that Network Rail's licence included conditions under which the railway must operate and is the primary tool which the Office of Rail and Road (ORR) has for holding Network Rail to account in respect of safety and operational efficiency. The Licence contained conditions which govern Network Rail's competence to grant new rights which affect operational land; the grant of any such rights would require the consent of the ORR. Mr Greenwood said that Network Rail would not receive such consent from ORR to grant a new public right of way over the railway as the grant would undermine the business of operating and improving the network. Condition 7 of the licence prevented the disposal of railway land without ORR consent and 'disposal' for the purposes of condition 7 included the '*grant of any other encumbrance or knowingly permitting any encumbrance to subsist*'. It was submitted that a change of the status of the crossing from a private vehicular crossing to one which also carried public rights was a 'disposal' of the land which given the implications regarding safety and risk would not be consented to by ORR.
  15. Although there had been no fatalities at Zulus Crossing, an increase in pedestrian use of the crossing as a result of the existence of a public right of way is likely to increase the risk of an accident or fatality occurring. Such increase in risk and danger to both crossing users and passengers on the railway is reflected in the revised ALCRM risk assessment. In my view, use by the public of Zulus Crossing would be incompatible with Network Rail's ability to undertake and execute its statutory objectives as set out by the legislation governing the operation of the railway network.
  16. Section 55 (1) of the BTCA provides that '*Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty...'*.
  17. The claimed footpath crosses the Nottingham – Newark railway on the level and it is clear that the land is part of the operational railway. The crossing therefore satisfies the description of land found in section 55 as being '*the lines of the railway*'. Use of Zulus Crossing by the public therefore constitutes an offence under section 55 of the 1949 Act.
  18. It was argued by the RA that the principles established in *Bakewell Management Ltd v Brandwood* [2004] (*Bakewell*) could be applied to pedestrian use of Zulus Crossing. In *Bakewell* the House of Lords found that rights could be acquired over land through unlawful long use if that unlawful use could have had been authorised. The RA contended that although section 55 of the 1949 Act makes trespass over '*the lines of the railway*' a criminal offence, it must be within Network Rail's power to authorise what would

otherwise be a trespass since customers have to go *'in dangerous proximity to lines of railway'* in the ordinary course of using the railway.

19. At issue in *Bakewell* was whether the use prohibited by statute could have been authorised and therefore not be a criminal act. In that case the offence of driving across a common was committed when done *'without lawful authority'*. The House of Lords found that authority to drive over the common could have been given and therefore no offence would have been committed. The Road Traffic Act 1988 and the Law of Property Act 1925 both prohibit the driving on a common *'without lawful authority'*. The RA contends that although section 55 of the BTCA does not include the term *'without lawful authority'*, the concept of trespass is such that it implies that authority could be given by the landowner. The RA notes that rail passengers are regularly in *'close proximity to lines of railway'* when they stand on platforms waiting for their train; these people must be trespassers under the provisions of section 55 but are permitted to remain by Network Rail.
20. I am not persuaded by the RA's line of argument on this point for a number of reasons. First, *Bakewell* concerned criminality because the landowner could give, but had not given lawful authority to drive over the common. This is in direct contrast to section 55 of the BTCA which makes trespass on the railway a criminal act and where there is no provision for the network operator to give *'lawful authority'* for such acts. Secondly, Network Rail cannot grant such authority as it would be contrary to the terms of the license under which it operates. Finally, the analogy drawn by the RA regarding passengers standing on a platform as engaging in *'authorised trespass'* when they are in *'close proximity of the rails'* is incorrect; any passenger present on a platform is an invitee or client of the railway company and is therefore not a trespasser.
21. Furthermore, passengers standing on platforms are presented with a number of safety related messages regarding where not to stand so that they are not placed at risk; notices such as *'keep away from the platform edge'* and the line painted on the platform edge to mark out where it is safe to stand prevent passengers from being in *'close proximity of the rails'*. Trespass on the railway at railway stations is committed when and if passengers contravene those notices which warn against trespass which are usually located at the ends of the platform.
22. In any event, in *Bakewell* the House of Lords drew a distinction between those cases where it was possible to authorise use and remove the element of criminality and those in which it was not; *"It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant of the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the owner to grant."* Zulus Crossing falls into this latter category as it is not possible for Network Rail to authorise the use which the public have made of the crossing.
23. There can be no doubt that the action of members of the public walking over Zulus Crossing is a trespass *'over the lines of railway'* in contravention of

- section 55 of the BTCA. The only persons authorised to use Zulus Crossing are Severn Trent Water as successors in title to the owner whose land were bisected by the construction of the railway and for whom the crossing was constructed.
24. For a penalty of trespass to be applicable under section 55 of the 1949 Act it is necessary that notice to not trespass on the railway has been given at the railway station nearest to the point where the trespass is alleged to have taken place and that such notices have been renewed when defaced or destroyed.
  25. Network Rail submitted copies of photographs of signs at Burton Joyce and Carlton stations taken in June 2015 and September 2015 respectively. I viewed the signs at Burton Joyce station myself as part of my unaccompanied site visit. The photographs show signs located at the ends of the platform which give warning to pedestrians not to cross the line or pass beyond the sign. It was Miss Bedford's evidence that the signs at Burton Joyce and Carlton stations had always been in place and that although the current signs did not mention the word 'trespass', their meaning was clear and unambiguous. It was Miss Bedford's understanding that the required signs had always been in place and although there was no photographic evidence to that effect from the 1950's to the 1990's, Miss Bedford considered it to be more likely than not that the required signs had been maintained in place at all material times.
  26. There is no direct evidence that the relevant signs have been in place at Burton Joyce or Carlton stations since 1949 but equally no evidence has been submitted to demonstrate that such notices had not been present. In the absence of any contrary evidence I attach some weight to Miss Bedford's evidence which was subject to cross-examination and was not demonstrated to be incorrect. Given that the network operator has a statutory duty to prevent trespass on the railway, I consider it more likely than not that the required prohibitory notices have been present at Burton Joyce and Carlton stations to give effect to section 55 of the 1949 Act in respect of pedestrian use of Zulus Crossing.
  27. Notices and signage has also been present at Zulus Crossing to advise authorised users on the safe use of a 'user-worked' crossing. A photograph of the site taken in 1993 shows a sign which is headed 'Stop Look Listen'; other words are also present on the sign but the quality of the photograph and the graffiti on the sign makes the remaining wording illegible. The Council stated in its report to the Rights of Way Committee that the additional wording was '*Notify local British Rail Manager before crossing with a vehicle which is unusually long, wide, low, heavy or slow moving. 1. Open both gates quickly and look in both directions before crossing. 2 Cross quickly. 3. Close and secure gates after use. Penalty for not doing so £100*'. This same signage appears to have remained in place until at least 2006 and is shown in a photograph taken in July of that year.
  28. Currently present at Zulus Crossing is a large sign on each gate which reads '*Private level crossing authorised users only*'; further signs on the gates warn of a '*penalty for not closing gates £1000*'. There are other signs which give advice on the safe use of the crossing with vehicles and animals and a sign with the legend '*warning do not trespass on the railway penalty £1000*'. I accept that the signs currently in place were not present in 2006 when the RA's

- application was made and that the signs which were present during that period were not as comprehensive as they are today.
29. The witnesses I heard from at the inquiry confirmed that there had been signs present on site although recollections about the precise wording of those signs was mixed. Mrs Wollacott recalled a sign saying '*please close the gate*' but no other signs; Mrs Gretton recalled a sign on the gate which read '*failure to close gate penalty*'; Mr Wright had seen a sign near the gate but he could not recall the wording. Mr Bethell had used the crossing as part of his duties for Severn Trent Water and recalled cast iron signs being present at the crossing prior to the printed steel signs which had been present since at least 1993; he recalled signs along the lines of '*keep gate closed*' or '*close gate after use*'. Mr Parkes recalled the existence of signs but not the wording.
  30. The RA submit that to all intents and purposes the signage present during the 20-year period did not convey to the user that the crossing was a private accommodation crossing; the absence of appropriate signage meant that the user had deduce from the physical characteristics of the crossing as to whether it could be used. It was submitted that at many crossings there are signs which say 'do not trespass on the railway' which is likely to be understood by users not to turn left or right to walk along the tracks. In the RAs view, Zulus Crossing was not dissimilar to the other crossings of the Nottingham – Newark line that the public were used to using.
  31. It was Network Rail's case that appropriate signage had been erected and maintained at all times at Zulus Crossing and that the signage was directed at the authorised users of the crossing; that is, those who held a private vehicular right of way - the signage which had been present prior to 2006 could not be construed as implying a licence to the public to use the crossing.
  32. The photographic evidence demonstrates that signage was present at Zulus Crossing. I agree with Network Rail that the wording of the signs present from at least 1993 until at least 2006 was directed at the private user of the crossing; the public having no rights over the crossing, let alone rights with large, wide, low, heavy or slow vehicles. These signs clearly offer advice to the private rights holder on how to safely cross the railway. There does not appear to have been any signs which specifically warned against trespass on the railway at Zulus Crossing until after 2006. However, the absence of such signage is immaterial given that I have concluded that signs which complied with section 55 (3) of the BTCA were present at Burton Joyce and Carlton stations during the relevant period; in such circumstances any use by the public of Zulus Crossing would have amounted to criminal trespass.
  33. It is apparent from the images recorded by the covert camera during August 2015 that public use of Zulus Crossing is continuing despite the existence of signs warning against trespass and despite both gates being locked to prevent unauthorised use. Although the RA submits that there are good sight lines at Zulus Crossing which allows pedestrians to cross in safety, the ALCRM methodology employed by Network Rail suggests that there is a high risk of accidents occurring at this crossing; just because there has been no fatality at the crossing does not mean it is safe to use.
  34. I only heard from 5 user witnesses as the inquiry and a total of 33 user evidence forms were submitted in support of the application. The user evidence collectively demonstrates that the public has habitually crossed the rails at

- Zulus Crossing throughout the 20 years prior to 2006, with some users claiming to have walked over the rails on a weekly basis and others on a monthly basis.
35. Some of this use must have involved climbing over a locked gate at the Stoke Bardolph side of the railway prior to 2002 when Mr Jackson replaced the padlock with a hook and eye fastening. The locking of the gate to prevent unauthorised use of the crossing would effectively interrupt the public's enjoyment of the way and the action of climbing over a gate which has been specifically locked to prevent access can be regarded as use with force. In such circumstances, at least some of the claimed use during the 20 years prior to 2006 would have been interrupted and some would have been use which was not '*as of right*' if the provisions of section 31 (1) were applicable to this case. However, any of the use by the public after 1949 is negated by the continuing effect of section 55 of the BTCA.
  36. The claimed footpath crosses an operational railway on level and the dedication of a public right of way in such a location would be incompatible with the statutory objectives of Network Rail with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. Under the provisions of previous and current legislation governing the operation of the railway network, Network Rail and its predecessors lacked the capacity to dedicate new public rights of way over the live rails at Zulus Crossing. As Network Rail lacks the capacity to dedicate a public right of way, the way across the live rails is of a character which could not give rise to a presumption of dedication at common law.
  37. As dedication of a public right of way at common law cannot have occurred at Zulus Crossing, it follows that the provisions of section 31 of the 1980 Act are not engaged. Furthermore, at all material times during the relevant 20-year period Zulus Crossing has been subject to the provisions of section 55 of the 1949 Act. Any use of the crossing by the public has been unlawful and it is not possible for Network Rail to grant lawful authority for such use. I conclude that as it is not possible for dedication of a public right of way to have occurred at common law the Order should not be confirmed with regard to Zulus Crossing.
  38. The remainder of the Order route crosses land owned by Severn Trent Water and that land is not subject to the same statutory restrictions as the land owned by Network Rail. The available user evidence is of use of the path throughout the 20 years prior to 2006 and other than the challenges to use said to have been made by Mr Jackson in around 2007, there is little evidence to suggest that use was interrupted or was by stealth, force or with the permission of the owner. In addition, no evidence was presented to demonstrate that Severn Trent Water took active steps to inform the public that there was no intention to dedicate a right of way over what is an internal access road. Mr Jackson spoke of signs being present around the estate at the time when waste treatment took place in large open lagoons, but modern methods meant that the estate now had the appearance of a normal farm estate.
  39. Whilst there is nothing to prevent a public right of way being a cul-de-sac at one end, the result of the section over Zulus Crossing not being recorded as a public right of way would be the recording of two culs-de-sac each one ending at the railway. These footpaths would not connect with any other path in the

network in the vicinity of the railway and would only lead to the railway at Zulus Crossing. To use the 'missing link' between these two paths would constitute a criminal trespass, and the 'missing link' cannot therefore be regarded as a legitimate point of termination sufficient to justify public rights leading directly to either side of the railway.

40. I consider that as there is no legitimate place of public resort at either cul-de-sac, the remainder of the Order route could not be lawfully established as a public highway at common law. It follows that the Order should not be confirmed to show the residual part of the Order route as two cul-de-sac paths.

### **Conclusion**

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

### **Formal Decision**

42. I do not confirm the Order.

*Alan Beckett*

Inspector



Inquiry documents:

1. Bundle of photographs showing pedestrian use of Zulus Crossing between 10 and 19 August 2015.
2. Bundle of photographs of signage at Burton Joyce and Carlton stations.
3. Copy of section 55 of the British Transport Commission Act 1955.
4. Copy of Order Decision dated 18 May 2015 FPS/Q2500/4/29.
5. Copy of Order decision dated 28 June 2013 FPS/Q2500/7/69.
6. Extracts from Railways Act 1993.
7. Extracts from Railways Act 2005.
8. Report into fatality at Frampton level crossing.
9. Merstham Manor Limited v Coulsdon and Purley UDC [1937] 2 KB 77.
10. Bakewell Management Limited v Brandwood [2004] UKHL 14.
11. Rights of Way Act 1932.
12. R (oao Newhaven Port and Properties) v East Sussex County Council [2015] UKSC 7.
13. Copy of decision FPS/W2275/14A/15.
14. Closing submissions on behalf of Network Rail.
15. Closing submissions on behalf of the Ramblers' Association.