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## Order Decision

Inquiry held on 19 January 2016

**by Martin Elliott BSc FIPROW**

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

**Decision date: 18 February 2016**

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### **Order Ref: FPS/L3055/7/91**

- 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 (Arnold Footpath No. 56) Modification Order 2013.
- The Order is dated 13 September 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 were three objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed.**

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### **Procedural Matters**

1. I held a public local inquiry on 19 January 2016 at Sherwood Hall, 1 Edwards Lane, Nottingham. I carried out an unaccompanied site inspection of the Order route on the afternoon of 18 January. I was unable to gain access to the entire route as parts are obstructed by vegetation and towards the western end the route is obstructed by a locked gate. I was nevertheless able to view the route from the sections to which I could gain access. I did not carry out a further site visit following the close of the inquiry as there were no issues which required me to do so. None of the parties required me to carry out a further site visit. Although I have been unable to access the entire route I am satisfied that I can make my decision on the basis of my site visit and the evidence before me.

### **The Main Issue**

2. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(b). The main issue is whether the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during the period raises a presumption that the way has been dedicated as a public path.
  3. The test to be applied to the evidence is on the balance of probabilities.
  4. In seeking confirmation of the Order the Council rely on the evidence of use and the statutory dedication under section 31 of the Highways Act 1980.
  5. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a 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 period of twenty years, the way is deemed to
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have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.

6. Issues have been raised as to the width of the Order route and I consider this further at paragraphs 32 to 42 below.

## **Reasons**

### ***Background Issues***

7. Castle Bar Properties state that in purchasing the property at the western end of the Order route they were advised that the route was a private right of way. Mr Azam was also of the view that the route passed over land within his ownership and was therefore private. Whilst the Order route passes over private land and is subject to a private right of way this does not preclude the existence of public rights or such rights being acquired subject to the necessary requirements being fulfilled.

### ***When the right to use the way was brought into question***

8. In December 2007 a gate on the order route, located to the rear of the shops on Mansfield Road, was found locked. A notice on the fence next to the gate informed that the gate would be locked from 1800 to 0600 hours. A further notice at the eastern end of the route indicated that there would be no access to Mansfield Road during these times. Although the notice indicated that use of the route would be prevented during the specified hours the gate was, on occasions, locked at other times. The locking of the gate and the erection of the notices would have raised questions as to the public status of the way and in my view would have brought the right to use the way into question. This would set the relevant twenty year period as 1987 to 2007.
9. Castle Bar Properties suggest that an earlier twenty year period should be considered. Mr Tisbury advised that construction works at the western end of the route commenced in June 2006 and continued until November/December 2006; this was for the development of two stores. During this time Mr Tisbury stated that the site was completely fenced and that there was no access to the Order route. Mr Tisbury explained the obligations in respect of health and safety and the need to secure the site from the public. Although in cross-examination Mr Tisbury accepted that he only visited the site on a number of occasions he was clear that there would have been no access at this time. He also accepted that the fencing which was erected at the rear of the property could have been moved so as to allow access, although he thought this unlikely. However, he contended that there would still have been no access through the site due to hoardings at the western end of the route.
10. In support of the Order Mrs Doughty said that she never really examined whether she could get through the development. She just took a route around until the works had finished and then continued using the route. Mr and Mrs Phillips considered that the route had been closed for health and safety and Mrs Phillips thought the route would be reopened after the works. Mr Bayston stopped using the route during the works and wondered if the path was to be blocked off. He started using the route again when the development was completed. Mr Monkton stated that the path was unavailable for four to five

months due to the building works. In responding to questions from me in relation to the works, Mr Monkton said that he thought he had been faced with a 'fait accompli' and that the path was going to be taken away. However, in re-examination he said that this was the case when the gates were locked.

11. Looking at the evidence as a whole it appears to me that the route was obstructed when the site at the Mansfield Road end of the path was being developed. Only Mr Proctor claimed to have used the route during this time although he did say that the route was obstructed by earthworks and fencing. Whilst the evidence is not substantial the obstruction of the route during the construction works appears to have raised some doubt as to the right to use the way. On the balance of probabilities I conclude that the right to use the way would have been brought into question in around June 2006.
12. Bearing in mind the above the relevant twenty year period to be considered is 1986 to 2006.

### ***Evidence of use 1986 to 2006***

13. The evidence of use forms submitted by the Council demonstrate use of the Order route as of right and without interruption. Some twenty-two individuals have used the Order route for the full twenty year period. A further fourteen have used the route for part of the period with some of those using the way for a substantial proportion of the twenty year period. Use was mainly on foot, with some use by bicycle, generally on a daily or weekly basis with the earliest use dating from 1935.
14. The Council has taken a number of statements from those who have completed evidence of use forms. These statements show that a further two individuals have used the way for the full twenty year period. The evidence of use forms and additional statements indicate that those using the way saw others using the route. Some individuals outline in their statements that when using the way they saw those who live adjacent to the path and that they would exchange greetings; their presence was not challenged.
15. A number of individuals gave evidence to the inquiry as to their use of the way. In my view this was consistent with the evidence of use forms and additional statements.
16. There is an indication that the Order route at times was affected by vegetation. Although at times the route may have been difficult to use due to vegetation there is nothing to indicate that use of the way was prevented.
17. I note the observations of Castle Bar Properties that during the Planning Committee meeting to determine the application to develop the land no one made reference to a public right of way. Further that Nottinghamshire County Council raised no concerns regarding the gating of the path. Whilst this may be the case it does not mean that the way was not used. As regards the absence of concerns from the Council, given that the route is not recorded on the definitive map and that no application had been made to add the Order route to the definitive map at the time of the planning application, the absence of concern is not unexpected.
18. The point is also made that it is difficult to understand how users of the path did not know of the community meetings which were held which discussed the locking of the gate. Again this does not mean that the route was not used.

19. Taking all the evidence into consideration, the Order route has been used by the public, as of right and without interruption. That use is sufficient to raise a presumption that the way has been dedicated as a public footpath.

***Whether any landowner demonstrated a lack of intention to dedicate***

20. In view of my findings it is necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way. For there to be sufficient evidence that there was no intention to dedicate the way there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that they had no intention to dedicate. The test is whether a reasonable user would have understood that the landowner, that is the owner of the land over which the route passes, was intending to disabuse the user of the notion that the way was public.
21. Mr Azam is the owner of the section of the Order route forming part of 9 Woodland Grove since February 2002. Mr Azam contends that since he purchased the land he has erected signs to the effect that the land is private. He said that signs were replaced several times due to vandalism and deterioration. He also says that since 2002 he challenged those using the way at least several times a year.
22. In support of his case Mr Azam referred to photographic evidence submitted by the Council. He accepted that the notices shown in the various photographs had been erected after 2007 and therefore outside the relevant period. Such notices would have no retrospective effect.
23. Mr Azam submitted two items of correspondence. Correspondence from Mrs Reynolds outlines that signs were in place indicating that the section of the route over Mr Azam's land was private land. However, Mrs Reynolds has only assisted Mr Azam with his gardening for the past 6 years. Mr Azam accepted in cross examination that her knowledge did not extend into the relevant period. Correspondence, dated 10 November 2015, from a Mr Pearson who moved to Woodland Grove in April 2006 indicates that there have been signs erected on the Order route for a number of years since resident in Woodland Grove. The knowledge of Mr Pearson, in the absence of further information, only relates to the latter part of the twenty year period.
24. Whilst I note this correspondence, the evidence does not accord with those who gave evidence to the inquiry who did not recall seeing any signs during the relevant period. Only two of those who have provided evidence to the Council recalled any signs on the route. A Cynthia Marette stated that she saw a 'private route' sign on a telegraph pole but she provides no information as to when the notice was in place. A Robert Feeney stated that his wife noticed a sign although in evidence Mrs Feeney stated that she had always considered the route to be a public right of way. A further twenty-five individuals assert that there were no signs on the route.
25. In respect of challenges, Mr Azam stated that from 2002 he challenged people who were on the section of the Order route owned by him and advised them that the land was private. Mr Azam also refers to documents within the Council's bundle outlining challenges. A Mr Luczko owner of 19b Woodthorpe Drive until 2014 states that he has personally challenged people using the lane for access and advised them that the land was private property. Subsequent

- correspondence indicates that challenges were made to those who were 'loitering' on the property. The correspondence from Mr Luczko indicates that his neighbour, a Mr Kong, had issues with the public and 'undesirables' congregating outside his property and the parking of vehicles. The inference from the correspondence is that he also made challenges. However, details as to the challenges are lacking but the correspondence suggests that the challenges were not made to those walking along the route but to those engaging in other activities. Mr Luczko also states that every Christmas Day Mr Kong would park across the order route to block it.
26. Mr Azam refers to a number of other challenges in respect of the Order route. However, these fall outside the relevant period and have no retrospective effect.
27. The evidence of Mrs P Ibell indicates that she was challenged for cutting back nettles overhanging the path. Mr B Rollinson was also challenged by a resident of Woodland Grove in 1998 when cutting back nettles and was informed that the land was private. Mr Rollinson continued using the path although did so less frequently after 1998 but not as a result of the challenge.
28. Having regard to the above, whilst Mr Azam indicates that signs were erected on the route, use of the route continued throughout the relevant period. I do not dispute the assertions of Mr Azam as to the existence of signs. However, there is nothing to indicate that, notwithstanding the fact that most users did not see any signs, any signs disabused the public using the path of the notion that the way is a public footpath. Use continued through the relevant period.
29. As regards any challenges, none of those using the way, other than those identified at paragraph 27 above, were challenged in their use of the way. Mrs Ibell and Mr Rollinson were challenged when cutting back nettles, such activity would not be consistent with the exercise of a public right of way; to carry out clearance work without the consent of the landowner would be an act of trespass. It is therefore not clear that challenges to them related to the use of the way. In any event their use continued. I note the assertions of Mr Azam as to challenges and accept that in the circumstances it would not be expected that Mr Azam would have thought to have collected any details of those he challenged. However, as noted above, there is nothing to indicate that those using the way were challenged. Use continued throughout the relevant period and indeed after the locking of the gate at night. Bearing in mind the above I do not consider that any challenges were sufficient to demonstrate a lack of intention to dedicate.
30. In respect of the blocking of the Order route by Mr Kong, there is no evidence that anyone was prevented from using the way as a consequence. I also do not consider that those using the way, when cars were parked over the Order route, would have understood that the landowner was demonstrating a lack of intention to dedicate.
31. Taking all factors into account I conclude that any actions taken to demonstrate a lack of intention to dedicate the route as a public footpath were insufficient. As such the statutory dedication is made out.

### **Width**

32. Castle Bar Properties contend that there is no evidence that the width of the Order route should be 3 metres throughout its length. However, Castle Bar Properties suggests that 1 to 1.5 metres along the side of the service yard, as shown on inquiry document 2, could be supported by the evidence and would not be opposed by them. Mr Tisbury stated that he would not object to a width of 1.2 metres.
33. Mr Azam said that in the event of confirmation he wished the width to be amended to record 2.4 metres or less on the section over his property. This would reflect the current width arising from the erection of his fence.
34. Whilst I note the suggestions made by Castle Bar Properties and Mr Azam the width identified in an order will be based on the evidence; it will be the case that in some situations the width will be greater than the trodden width. I nevertheless appreciate that Mr Azam erected his fence prior to making the Order and that the width provided, and maintained by him, was considered by Mr Azam to be sufficient for those whom he understands to have a right of access. I also acknowledge that the width identified in the Order, or any width greater than 2.4 metres, will require Mr Azam to realign his fence. However, the desirability of the width and the effect on any landowner is not a matter which I can take into account in reaching my decision. As noted above, the width will be based on the evidence.
35. The Council maintains the view that the width of the Order route should be confirmed at 3 metres.
36. From my examination of the statements submitted by the Council the width identified varies from as little as 0.457 metres (18 inches) to 3 metres. The majority of those who have stated a width identify it as from around 1 to 2 metres. Reference is made to the fact that the route had been wider in the past although Mr and Mrs Phillips state that the western section is now wider than it used to be.
37. Witnesses in support of the Order gave evidence as to the width. For convenience I shall consider the Order route in three sections as identified by the Council. The eastern section being the first section of the Order route from Woodthorpe Drive which has a tarmac surface, the middle section from the end of the tarmac section to the gate and the western section being the land owned by Castle Bar Properties.
38. As regards the eastern section, the overall width was identified at around 7 to 8 metres. However, a number of witnesses indicated that they would use the middle of this section. Mrs Doughty explained that here were often parked cars along the edge. Mrs White tended to use the middle of this section or the part close to the houses. More often than not Mr Bayston used the middle of this section of the route.
39. In terms of the middle section the majority of the witnesses identified the width as 2 to 3 metres although Mr B Rollinson said that the width was about 2 metres and Mr Proctor identified the trodden section as 0.90 metres. It was recognised that the width would diminish in the summer in consequence of overgrowth and that towards the end of the relevant period the route became narrower. This is consistent with the evidence from Mr Tisbury that in 2005 he

could not get through although at the time he was wearing a suit. It should be noted that none of the users of the way were prevented from using the path due to overgrowth. Mrs Doughty was unable to give a width but stated that she could use the path with a trolley case and pass other users without difficulty. Mrs Phillips stated that the path was wide enough to take a push chair without the need to walk single file. Mrs White also stated she could walk comfortably side by side with others.

40. In respect of the western section Mr Proctor stated that he could use the full width. Mr B Rollinson stated that it was around 4 to 5 metres and Mr C Rollinson said that this section was more or less the same but that he would use the centre of the route. Mrs Phillips and Mr Bayston thought this section was around 4 metres.
41. Mr Tisbury provided a photograph of the western end of the route taken in 2005 showing the former pet store. He made the point that looking at the condition of the ground and the fact that the land would be used for vehicle parking and delivering to the various premises the width should be restricted to 1 or 1.5 metres. The photograph provides a snapshot of the western end of the path. However, the evidence from the witnesses is that the whole of the area was used by pedestrians. It may be the case that from time to time there would have been temporary obstructions from parked vehicles or materials from the adjacent premises. However, there is nothing to indicate that any obstructions were of such a nature as to limit the dedication of a public footpath to 1 or 1.5 metres.
42. Having regard to all of the evidence I conclude that in the circumstances, and in the absence of evidence to the contrary, a width of 3 metres is reasonable. Returning to the issue of the effect on Mr Azam's fence, clearly with a width of 3 metres the fence will encroach on the Order route. However, even if I was minded to modify the Order to 2.4 metres the fence will still encroach onto the Order route. The evidence before me from both the written statements and the oral evidence is that the Order route along the middle section followed an alignment along the centre of the track. Both Mr Bayston and Mr Monkton stated that the fence encroaches onto the line of the Order route. As such the Order route is obstructed by the fence.

### **Other Matters**

43. Mr Azam contended that in setting the width of the path at 3 metres the Council has been disrespectful and dismissive as to the needs of the landowners, a similar point being raised by Mrs Reynolds. Whilst I note these concerns the Council is required to base the width of the path on the evidence before them. In this case they considered the width to be 3 metres. It should also be noted that the Council is acting in accordance with its statutory duties under the 1981 Act. The Council has a duty to modify the definitive map and statement in consequence of any events specified in section 53(3) of that Act including section 53(3)(b) under which the Order has been made.
44. Concerns have been raised in respect of antisocial behaviour, security and the Council's funding priorities. Again I note these concerns but they are not matters which I can take into account in determining the Order. The relevant criteria are set out above at paragraphs 2 to 5.

**Conclusion**

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

**Formal Decision**

46. The Order is confirmed.

*Martin Elliott*

Inspector

## APPEARANCES

### **Nottinghamshire County Council:**

Miss C Bell

Of Counsel, instructed by Nottinghamshire  
County Council

who called

Mr A Trundle

Definitive Map Officer

Mr R Proctor

Mr B Rollinson

Mr C Rollinson

Mrs C Doughty

Mr D Phillips

Mrs E Phillips

Mrs M White

Mr R Bayston

Mr D Monkton

### **Also in support of the Order:**

Mrs Feeney

### **In opposition to the Order:**

Mr M Tisbury

Castle Bar Properties

Mr R Pearson

Castle Bar Properties

Mr J Azam

Landowner

Mrs G Reynolds

## DOCUMENTS

- 1 Details of landownership (D21a)
- 2 Plan submitted by Castle Bar showing preferred route