



Order Decision

Inquiry held on 19 September 2007

by **Alan Beckett** BA, MSc, MIPROW

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

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Decision date:
25 October 2007

Order Ref: FPS/L3055/7/33

- 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 (Selston Footpath No. 72) Modification Order 2002.
- The Order is dated 25 January 2002 and proposes to add to the Definitive Map and Statement a public footpath over land situated in Selston as detailed in the Order map and schedule.
- There were 13 objections outstanding when Nottinghamshire County Council ("the County Council") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

Summary of Decision: The Order is confirmed.

Preliminary Matters

1. I made an unaccompanied inspection of the route in question from public vantage points on Tuesday 18 September 2007 and I held a public local inquiry into the Order at Selston Parish Hall, Mansfield Road, Selston on 19 September 2007. The parties to the Order did not require me to make a further accompanied inspection following the closure of the inquiry.
2. The County Council, as order making authority, stated at the opening of the inquiry that they were adopting a neutral position with regard to the Order. However, prior to the inquiry, the Council had submitted a proof of evidence which contained an analysis of the documentary and user evidence, together with a request that the Order should be not confirmed. During a brief adjournment, the County Council considered its position and opted to take an active part in objecting to the Order which it had been directed to make.
3. The case for the Order was made by Mr D Grundy on behalf of the applicant, Mr F E Wood.

Background

4. An application to add the claimed route to the Definitive Map and Statement had been made in October 1999. Following a consideration of the application by the Senior Definitive Map Officer (acting under delegated powers) in March 2001 the County Council determined not to make a modification Order.
5. A successful appeal under Schedule 14 of the 1981 Act was made to the Secretary of State for the Environment, Food and Rural Affairs who directed the County Council to make the Order.
6. The Order route commences on Inkerman Road at Ordnance Survey (OS) grid reference SK 4697 5228 adjacent to the site of the now demolished Miners

Arms public house and runs in a generally northerly direction to Inkerman Street at OS grid reference SK 4698 5235, a point near to the site of the former Inkerman Inn, a public house which closed in 1958 or 1959. I heard that two blocks of cottages stood between the Miners Arms and Inkerman Street which took their access from the claimed route; these cottages had been demolished in the 1960s.

7. I saw from my site visit that a new property, No. 20 Inkerman Street had been built on the site of some of the cottages, and the line of the claimed right of way would pass over land now forming part of the front and rear garden of that house. I understand that this property was built in 1998 or 1999. At the time of my site visit there was no physical evidence of the claimed path as the former site of the Miners Arms and some land between Inkerman Street and St Michaels View was in the process of being redeveloped for housing.
8. In seeking confirmation of the Order, Mr Grundy submitted that the Order route formed part of long-established public right of way which had been illegally closed in 1963. In objection, the County Council submitted that the long established right of way had been extinguished in the 1870s and there was insufficient evidence to demonstrate that public rights had been subsequently acquired either at statute or common law.

The Main Issue

9. The Order was made under Section 53 (2) (b) of the 1981 Act, relying on the occurrence of events specified in Section 53 (3) (c) (i). The main issue is therefore whether the evidence discovered, when taken with all other relevant evidence is sufficient to show, on a balance of probabilities that a right of way not shown in the Definitive Map and Statement subsists over land in the area to which the map relates.

Reasons

The documentary evidence

10. Mr Grundy put forward a history of the footpath network in the Selston area, on which he is an accepted local authority. It was Mr Grundy's case that the public's rights over the path at issue had been brought into question in 1963 by the erection of fencing and notices but that the Order path was part of a route whose origins were lost in antiquity and historically had provided a means of pedestrian access between the once isolated communities of Bagthorpe, Underwood and Hanstubbins. Mr Grundy was of the view that the Order path was one of a number of public footpaths in Selston that was in existence in 1845, as it was so shown on the tithe map of that date.
11. The field pattern shown on the tithe map can still be traced on a modern OS map and it is possible from a study of the two to identify the fields in which the communities of Inkerman and Alma were built. As the Crimean War battles from which Inkerman Road, Inkerman Street and Alma Road take their names were not fought until the autumn of 1854, it is unsurprising that these developments are absent from the tithe map.
12. The tithe map shows the Order route as running on the south-eastern field boundary of field 807 and is part of a longer single peck-line track running in a

generally north – south direction between Hanstubbin and a network of paths that lead to Bagthorpe. Unlike other peck line tracks on the map which are annotated "*Foot Road*", the Order route (or at least its continuation in the field immediately to the north of field 807) is only annotated "*F.P.*".

13. Although no conclusion can be drawn as to the status of the route shown as "*F.P.*" on the tithe map from this document alone, the annotation is more likely than not to denote a route subject to foot traffic, "*F.P.*" being a common abbreviation among cartographers for the term footpath; I am not persuaded that the annotation means "Farmer's Path" or "Fallow Path" as suggested by the objectors.
14. Mr Grundy put forward the suggestion that "*Foot Roads*" were ones used by pedestrians but may have been physically wide enough to be capable of use as drifts for cattle, whereas a "*F.P.*" was a narrower route suitable only for pedestrian traffic. However, I do not attach any significance to the continuation of the Order route having been given an annotation other than "*Foot Road*" by the tithe map cartographer; either annotation is more likely than not to reflect the capability of the each route to carry pedestrian traffic, whether public or private.
15. The tithe map provides evidence that in 1845 some observable path was present on the alignment of the Order route, even if no conclusion can be drawn from the map as to whether the path carried public rights.

Ordnance Survey ("OS") maps

16. No maps or plans contemporaneous with the development of Inkerman Street were submitted to the inquiry, the earliest plan showing the street being the 1881 OS 25" to 1-mile map. This shows the layout of cottages along Inkerman Street and the eight cottages that had been built almost at the eastern end of tithe field 807 between Inkerman Street and Inkerman Road.
17. The 1881 map also shows that there was a road or track linking Inkerman Street with Inkerman Road on the eastern boundary of field 807 which appears to have provided a means of access to the eight cottages referred to above. Subsequent Ordnance Survey mapping through the nineteenth and twentieth centuries shows that this road or track remained in existence and it was this track that was obstructed by fencing and notices in 1963.

Abstract of title

18. An 1864 conveyance that forms part of the abstract of title to No. 20 Inkerman Street relates to five dwellinghouses and land and the text of the conveyance records that three roads had been set out in the vicinity of the land conveyed. In the absence of a map, it is not possible to identify these roads. As the conveyance relates to the land on which No. 20 Inkerman Road now stands, one of the three roads identified in the conveyance may have been the road or track shown on the 1881 OS map which provided access to the cottages which formerly stood on the site of No. 20 Inkerman Street. There is no reference within the abstract of title to the existence of a public footpath over the access track to the cottages.

1879 Selston Inclosure award

19. The Selston inclosure award was made under the provisions of the General Inclosure Act 1845 ("the 1845 Act"). By his award, the valuer stopped up a section of footpath to the north of the Order route. In a section of the award headed: "*And I further declare that I have discontinued and Stopped Up the Public Roads and Ways in the said Parish hereinafter mentioned*", the public footpath to be stopped up was described as "*One other public footway commencing at the northeast extremity of Inkerman numbered 807 and extending thence on the northwest fence of 806a then along the east fence of 806 all numbered on the tithe plan then over allotment numbered 334 on the said Map A and terminating on the Hans Stubbing Road*".
20. This description is consistent with the route shown as "*F.P.*" on the tithe map which extended in a north-easterly then north-westerly direction from field 807 and provides evidence that the route shown on the tithe map was considered to be a public footpath. An inference can be drawn from the inclosure award that the remainder of the path over field 807 (the Order route) also carried public rights for foot traffic. If such rights had not existed over the Order route, there would have been no means by which the public could reach the path at the north of field 807 to travel to Hanstubbin prior to the development at Inkerman.
21. The County Council stated that Section 86 of the 1845 Act made provision for old inclosures within the parish to be allotted under the award. It was the County Council's view that the appearance of field 807 on a page of the award headed "*I do set out allot and award unto*" was evidence that field 807 was subject to the award, and although not physically enclosed it had been, in the County Council's words, "*legally enclosed*" by the terms of the 1845 Act and the award.
22. In the County Council's view, as the public rights over field 807 were not subsequently re-awarded by the inclosure valuer, those rights had been extinguished by the operation of Section 11 of the General Inclosure Act 1801 ("the 1801 Act") which provided that any routes not awarded over parcels of land subject to the inclosure process were to be stopped up and any subsequent use was unlawful.
23. Mr Grundy argued that as field 807 was not located within Selston Common it was not part of the lands within the parish which were being enclosed; in his view, the 1879 inclosure process did not apply to the land crossed by the Order route. Consequently, the public's rights over field 807 had not been extinguished by the provisions of the 1801 Act.
24. No argument was put to me that the 1845 Act had the effect of repealing the earlier 1801 Act or any of the provisions of that earlier legislation; and there is no reference within the 1845 Act to such repeal. As the 1801 Act remained in force at the time of the 1879 award, the general provisions of that Act would also remain in force and would be applicable to those lands encompassed by the Selston inclosure. I consider that if field 807 was subject to the inclosure process, then the provisions of section 11 of the 1801 Act would be applicable.
25. In arriving at a decision on the impact of the inclosure award, I have subjected the 1845 Act and those parts of the award which were made available by the

County Council to some scrutiny. I agree with the County Council that section 86 of the 1845 Act provided that pre-existing inclosures could be allotted by the valuer, but the precise terms of that section require consideration. Section 86 provides that it would be lawful for the valuer to order and direct that such old inclosures could be considered to be allottable where the consent in writing had been obtained from those persons who had an interest in such lands, and that the valuer could allot the lands on a proportion that was felt to be reasonable and just.

26. The extracts of the award submitted by the County Council provided the names of those individuals who had consented in writing to their inclosed fields being considered to be part of the lands allottable under the award, together with a list of the numbers of those fields shown on the tithe map and the inclosure award map for which consent had been given. There is no indication from the extracts before me that the owner of field 807 (the Representative and Trustee of the Inkerman Building Society) had given written consent for that parcel of land to be entered into the award.
27. The page of the inclosure award where reference to field 807 is recorded is headed "*I do set out allot and award unto*", and the subsequent table contains a number of sub headings in columnar format. These are: "*Person interested, residence and description*"; "*Allotments*", and "*Lands in respect of which Claims allowed and allotments made*".
28. Field 807 is recorded in the column headed "*Lands in respect of which claims allowed and allotments made*"; in the corresponding column headed "*allotments*" is the number "114". The appearance of field 807 in the award is more likely to have resulted from the owners of the field holding some claim to rights over Selston Common, a claim accepted by the valuer and recognised in the award by the allotment of parcel 114 in lieu of those rights. The making of a claim to rights over the lands on Selston Common, the appearance of field 807 in the award under the column dealing with claims and the recognition of the claim is consistent with the provisions of Section 47 and 48 of the 1845 Act.
29. Taking these matters into account, I am not persuaded by the County Council's argument that field 807 was "*legally awarded*", as its appearance in the award related to a claim of rights over the common under section 47 of the 1845 Act. There is no evidence before me that consent was given for field 807 to be entered into the inclosure award, and the absence of such evidence provides support for Mr Grundy's argument that field 807 did not form part of the lands being enclosed under the award. It follows therefore that Section 11 of the 1801 Act had no impact upon those public rights in existence on the eastern edge of field 807.

Conclusion on the documentary evidence

30. Given that the area in question was named after battles fought in 1854 as part of the Crimean War, I consider it to be more likely than not that the road layout shown on the 1881 OS map was present in the late 1850s or early 1860s and the conveyance provides some corroborative evidence of the existence in 1864 of the cottages shown on the later OS map.

31. The tithe map shows that a footpath ran over field 807 prior to its development for housing, and the inclosure award provides evidence that the footpath shown on the tithe map was a public footpath. The layout of the cottages on the eastern side of the field demonstrates that the developer took care not to obstruct the public right of way in the 1850s or 1860s, and had made provision for its continued availability over the access road set out to serve the cottages. Whilst I acknowledge that the abstract of title to No. 20 Inkerman Street does not mention a right of way over the land conveyed or abutting the land conveyed, I do not consider that the absence of the path from the abstract is sufficient to outweigh the inference that can be drawn from the tithe and inclosure documents. I conclude that the documentary evidence demonstrates that a public footpath existed along the route shown in the Order during the nineteenth century.
32. For the reasons given above, I am not persuaded that the provisions of Section 11 of the 1801 Act apply in this case. In the absence of any evidence to show that any formal action has been taken to extinguish the public right of way over field 807, those rights remain, following the maxim "*once a highway, always a highway*".

Evidence of use and other records

33. I heard from a number of long-standing residents of Selston who provided me with their personal recollections of the Order route, and their experiences of its use or lack of use.
34. Mr Grundy had made use of the path between 1935 and 1942 as part of the route he took to attend school at Bagthorpe. It was his evidence that the Order route had been widely known and recognised as a short cut between Inkerman Road and Inkerman Street. In addition to use by schoolchildren, the path had also been used by those attending Church outings arranged by the church that had stood in Inkerman Street.
35. Mr F E Wood's parents had been the licencees of the Inkerman Inn and he had used the Order route as a child from 1936 as part of his route to Bagthorpe School, and later as a means of access to visit his parents at the Inn. In addition to use by schoolchildren, the path had been widely used by people within the immediate area as a short cut to reach the Inkerman Arms.
36. Mr D J Wood described the Order path during his childhood in the 1950s as being rutted and overgrown and a place for children to play in. In his recollection there was no clearly defined pathway at that time, although travel between Inkerman Road and the Inkerman Inn remained possible, and he had used the path when visiting his grandparents at the Inn.
37. I also heard that Mr Page had been resident in Inkerman Street since 1955 and had also attended Bagthorpe School, but had walked along Inkerman Street and Inkerman Road as part of his route to school. He had not known the path to be a right of way and had been told that it was not by his parents. Mrs Povey had lived in Inkerman Road for 50 years and her husband and mother had been born and bred there. Between 1947 and 1952 Mrs Povey had collected payment from residents in the cottages which faced the Order route for coal that had been delivered by her father. She had only made use of the claimed route once in 1947 and had found it full of nettles, rutted and in a poor

- condition. Other written submissions claim that the path was never more than a means of access to the cottages, whereas others acknowledged that it had been used as a short cut to the Inkerman Inn.
38. Councillor Mrs Turner had undertaken a comprehensive examination of the minute books of Selston Parish Council for evidence of that Council's involvement in the survey of public rights of way under the National Parks and Access to the Countryside Act 1949. The minutes demonstrated that the Parish Council had been fully engaged in the process, and although 70 claimed rights of way were surveyed, there was no record in the minutes of the Order route having been considered by the Parish Council. The Parish Council had not objected to the omission of the Order route from the Draft Map and Statement in 1957, and made no further comment upon the publication of the Provisional Map in 1961.
39. The minutes record the correspondence between the Parish and the County Council during the early 1960s following the obstruction of the Order route and the representations made to the Parish Council on the matter by local residents. It was Councillor Turner's view that the minutes demonstrated that during the 1950s and the process of mapping public rights of way, the Order route had not been considered by the Parish Council to be a right of way.
40. The oral and minute book evidence submitted demonstrates, to my mind, the gradual decline in use and reputation of the Order route from the 1930s to the period immediately after the Second World War. The evidence of Mr Grundy and Mr F E Wood is that the route was frequently used by schoolchildren, churchgoers and visitors to the Inkerman Inn. The post-1945 evidence is of a route that was overgrown and difficult to use, the local importance of which had diminished to such an extent that it was not considered in the mid-1950s to be part of the local minor highway network within the parish.
41. The gradual decline in use and reputation of the path does not, however, detract from the evidence of the tithe and inclosure award documents which support Mr Grundy's case that a long-established public right of way on foot subsists over the Order route. The fact of the path having fallen into disuse from the middle of the twentieth century and its unavailability following physical obstruction in 1963 has no impact upon those public rights which were in existence in the nineteenth century and which have not been extinguished through formal action.

Other matters

42. I am aware that the Order route passes through what is now the garden area of No. 20 Inkerman Street and that development of the land to the east of No. 20 is likely to lead to further obstruction of the route. Whilst I have a degree of sympathy for Mr & Mrs Parker, the owners of No. 20 Inkerman Street, the current or potential use of the land crossed by the right of way are not matters which I can take into account when reaching my decision. The future management of the right of way is a matter for the County Council, and the conclusion I have reached is based upon a consideration of the evidence presented and not on what may appear to be preferable or desirable.

Conclusions

- 43. Taken collectively, the documentary evidence submitted provides a persuasive case for the existence of public pedestrian rights over the Order route such that the Definitive Map and Statement requires modification.
- 44. 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

- 45. I confirm the Order.

Alan Beckett

INSPECTOR

APPEARANCES

In support of the Order:

Mr D Grundy Franklynn, 192 Nottingham Road, Selston,
Nottinghamshire, NG16 6AB.

Who called:

Mr F E Wood 52 Skegby Lane, Mansfield, Nottinghamshire, NG19 6QR.

Other Supporter:

Mr D J Wood 52 Skegby Lane, Mansfield, Nottinghamshire, NG19 6QR.

Objectors:

Mr E Brennan Countryside Access, Nottinghamshire County Council,
Floor 7, Trent Bridge House, Fox Road, West Bridgeford,
Nottinghamshire, NG2 6JF.

Cllr G Turner 214 Nottingham Road, Selston, Nottinghamshire, NG16
6AB.

Mrs J Parker 20 Inkerman Street, Selston, Nottinghamshire, NG16
6BQ.

Mr J F Page 29 Inkerman Street, Selston, Nottinghamshire, NG16
6BQ.

Mrs M Povey 49 Inkerman street, Selston, Nottinghamshire, NG16
6BN.

Inquiry Documents

1. The Order.
2. Bundle of evidence submitted by the County Council.
3. Copy extracts from OS maps dated 1903, 1955 and 1960.
4. Letter from Mrs Edna Carter dated 8 September 2007.
5. Letter from Mrs I Frost dated 11 September 2007.
6. Undated letter from Mr & Mrs Corah.
7. Letter from Mr & Mrs B Wood dated 11 September 2007.
8. Letter from Mr F E Wood dated 11 September 2007.
9. Undated letter from Mr M Powis.
10. Letter from the occupiers, 9 Inkerman Street dated 3 September 2007.
11. Letter from Mr & Mrs Knighton dated 3 September 2007.
12. Petition against the opening of the footpath from Alma Road to Inkerman Street.
13. Submission from Cllr Turner regarding extracts from Selston parish Council minute book.