



# Order Decision

Site visit made on 11 December 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:**  
27 December 2007

## Order Ref: FPS/L3055/7/34

- 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 (Southwell Footpath No. 87) Modification Order 2003.
- Nottinghamshire County Council (the Order making authority or OMA) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order was made on 12 December 2003 and there were two objections outstanding.
- The Order proposes to modify the Definitive Map and Statement for the area by adding to it a public footpath between Church Street, Southwell and Southwell Footpath No. 12 as described in the Order plan and Schedules.

## Summary of Decision: The Order is confirmed.

### Preliminary Matters

1. None of the parties requested a public inquiry. I therefore made an unaccompanied site visit on Tuesday 11 December 2007, and have considered this case on the basis of the written representations forwarded to me.

### The Main Issue

2. The Order has been made under Section 53 (2) (b) of the 1981 Act relying on the occurrence of events specified in Section 53 (3) (b). For the Order to be confirmed I must be satisfied that the evidence shows, on a balance of probabilities, that the enjoyment of the way by the public has been for such a period of time as to raise a presumption that the way has been dedicated as a footpath by the owner of the land.
3. In the context of Section 53 (3) (b) of the 1981 Act, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant; these are:
  - a) the date on which the right of the public to use the claimed footpath was brought into question;
  - b) whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date on which their right to do so was brought into question; and
  - c) whether there is sufficient evidence that there was, during this period, no intention on the part of the landowner to dedicate the claimed footpath.

## Reasons

### *Background*

4. The Order path commences on Church Street, Southwell and runs in a generally south-westerly then south-easterly direction through the precincts of Southwell Minster, before running in a generally south-easterly then south-westerly direction over land that was formerly the grounds of the Minster School to connect with Southwell Footpath No. 12 at grid reference SK 70205357. The path surface within the Minster precincts is of stone and concrete flags, with the remainder of the path having a surface made up of concrete flags and tarmac.
5. The path is not constrained within physical boundaries with the exception of a section to the rear of Nos. 3 and 4 Vicar's Court. I understand that this link path was created by the Minster and the school as a means by which pupils at the school (particularly choristers) could travel between the school and the Minster without having to venture along Church Street.
6. Aerial photographs of the site taken in 1971, 1974 and 1979 show that the spur from the main path around the Minster towards the school was present on the ground as were the two spurs of the path from the school which lead north-west to the Minster and south-west to the school playing field and Southwell Footpath No. 12. The remainder of the path is obscured by the canopy of the trees that fringe the path, but it is more likely than not that it was also present at the dates that the photographs were taken, given that the other parts of the path are clearly visible. What cannot be determined from the aerial photographs is whether any gates were present along the route (as was claimed by some of the objectors), and if they were present, whether they were locked.
7. Other documentary evidence demonstrates that the Minster School's Church Street site was opened in October 1964. There is no documentary evidence which suggests the claimed path was in existence prior to the opening of the school. It was the OMA's case that, if a public right of way had come into being over the claimed path, it had done so as a result of use by the public in such a manner and for such a period that dedication could be deemed to have occurred.
8. Although the Head teacher and Board of Governors of the school originally objected to the Order, these objections were withdrawn when the school vacated the site and moved to new premises. I saw from my site visit that the former school premises have been sold to a construction company and the site is to be used for housing in the near future.
9. One objection was made by the then Clerk to the Chapter in support of the objection made by the Minster School. Although the Headmaster and Board of Governors have subsequently withdrawn their objection, the objection made in support by the Chapter Clerk has not been withdrawn.

***The date on which the right of the public to use the claimed footpath was brought into question***

10. A photograph published in June 2005 in the Nottingham Evening Post shows that the school site has been enclosed by a security fence which was not present on an aerial photograph taken in 2000. The fence crosses the claimed path, although it is not possible to determine from the photograph whether the gates erected across the path were open or closed at that time, and if closed whether or not they were locked.
11. The erection of the fence at the school can be dated to January 2001 when a Mr Hustwayte wrote to the Head teacher at the school complaining about the fence that had been erected not being in keeping with the Southwell Conservation Area. Mr Hustwayte also expressed his concerns with regard to the proposed blocking of the footpath by gates that were to be erected. Mr Hustwayte stated in his letter that he had used the path at issue for 30 years without hindrance.
12. A memorandum from the OMA's rights of way section to Nottinghamshire County Council's Education Department dated 23 May 2001 stated that the claimed path had been blocked off by locked gates and notified the Education Department that Southwell Town Council wished to make an application for a modification order to add the path to the Definitive Map and Statement. It was the OMA's case that the locking of the gates in or around May 2001 was the event that brought into question public use of the claimed path.
13. In his objection to the Order, the Rector Chori of the Minster, Mr P R Hale stated that when the link path to the rear of Vicar's Court had been created, a gate had been erected at the Minster end; the gate had subsequently fallen into disrepair and had been removed. Mr Hale did not provide any evidence as to whether this gate had ever been locked, or for what period the gate had been in place before being removed.
14. The former Chapter Clerk stated in correspondence in March 2003 that the path had been in existence for around 30 years and for much of that time there had been a black gate at the Minster end of the link path, which had been locked but which fell into disrepair due to vandalism. The Clerk did not provide any further clarification as to the date at which the gate had been locked.
15. A gate that was either left open or was closed but not locked would not prevent the public from passing between the school site and the Minster. In the absence of any evidence as to a date when this gate was allegedly locked, the submissions made are insufficient for me conclude that use of the path was brought into question at a date earlier than 2001.
16. Consequently I agree with the OMA that the use of the path was brought into question in May 2001 by the locking of gates in the school boundary fence that had been erected earlier that year. It follows therefore, that the 20-year period of use envisaged by section 31 (1) of the 1980 Act is from 1981 – 2001.

***Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public right was brought into question***

17. Seventy user evidence forms were submitted in support of the application, with the earliest claimed use being in 1948. It would have been possible for this respondent to have walked that part of the Order route from Church Street which forms part of a path that encircles the Minster in the late 1940s (as the circular path is shown on the 1938 Ordnance Survey map), but not the remainder of the Order route as it was not created until after 1964 when the school was built. Ten supporters claim to have commenced use of the path in the 1960s with the remainder commencing use in subsequent years. There are 46 supporters who claim to have used the path for periods in excess of 20 years prior to 2001.
18. Many supporters claim to have used the route on a daily basis, with others using the path several times per week, and others who have only used the path on a weekly or fortnightly basis. The result of further questions by the OMA as to the time of day that the path was used revealed a broad spread of use during daylight and evening hours throughout the week, including weekends. Use also occurred during and outside the normal hours that the school was open. Use was for recreation or pleasure, as a means of visiting friends in the town, and as a means of accessing the leisure centre; only 4 respondents stated that the path was used as a means of access to the school.
19. None of the respondents were challenged during their use of the path, and none recalled any notices on the route which questioned their right to use it. No evidence has been submitted which suggests that the respondents sought or were given permission to use the path, and the evidence of use submitted shows that use was open and in full view of those who were in control of the land.
20. The OMA had conducted interviews with a number of respondents and sought further evidence from other respondents in the light of the submissions made by the objectors with regard to a gate having been locked at the Minster end of the link path. None of the user witnesses had any recollection of a locked gate being present at this location, and very few mentioned a gate at all. Where reference was made to a gate, witnesses recall it always being open and the path being available for public use.
21. On the basis that both the objector and some user witnesses recall a gate as having been present at the Minster end of the link path, it is more likely than not that a gate existed at that point. However, I agree with the OMA that the most likely explanation as to why many users have no recollection of the gate is that they did not have to open it themselves, and its existence left no impression upon them. The preponderance of the evidence before me is also that the gate was not locked, even if it had been closed; I conclude that the presence of a gate did not cause an interruption in public use of the path.
22. I consider that the user evidence submitted in this case is more than adequate to demonstrate that the public have actually enjoyed the path at issue as of right and without interruption for a period in excess of 20 years prior to 2001.

***Whether there is sufficient evidence that there was during this twenty-year period no intention to dedicate the claimed footpath***

23. There is no evidence to show that a map, statement or statutory declaration under Section 31 (6) of the 1980 Act has been made in respect of the land crossed by the claimed footpath. Although there are notices posted in the Minster precincts adjacent to the claimed path, these read "*Cycling Prohibited*" and are silent as to whether there are any restrictions placed upon pedestrian use of the path. A notice is present at either end of the path within the former school grounds which informs the user that "*The Exercising Of Animals Is Forbidden*" in the grounds, but is not worded to prohibit pedestrian use of the path through those grounds.
24. A letter dated 24 November 2003 from the Dean and Chapter to the OMA states that, having considered the issue of the public footpath across the Minster precincts "*it was agreed to accept the recommendation of the Fabric Advisory Committee that the length of footpath between the path from the Minster School and the pathway which encircles the Minster be designated a public right of way*". I consider this letter to be a positive expression of the intention of the Dean and Chapter to dedicate to the public part of the claimed path which crosses Minster land.
25. In order for an owner to take advantage of the proviso to Section 31 of the 1980 Act, it is necessary for the intention not to dedicate to be brought to the attention of the public and must be directed at them in such a manner so that they are disabused of any notion they may have that the route at issue is a public right of way. There is no evidence before me that either the Dean and Chapter of Southwell Minster nor the Governors of the Minster School took any such action during the period under consideration. There is evidence from 2003 that the Dean and Chapter were content for a public right of way through the Minster precincts to be recognised.
26. I conclude that there is insufficient evidence to show that there was no intention on the part of the owners of the land crossed by the path to dedicate a public right of way during the 20-year period in question.

**Other Matters**

27. Mr & Mrs Hale stated that the path was initially created for the use of choristers walking between the school and the Minster. This may be correct, but the evidence demonstrates that the public have used this path extensively since its creation, and there is no evidence to suggest that steps were taken prior to 2001 to prevent or discourage such use. The original purpose for which the path was created is of no relevance to my consideration of the Order and I have not taken into account in reaching my decision.
28. In correspondence dated 22 November 2007, the current Cathedral Administrator stated that the link path between the Minster and the school site was secluded and prone to anti-social behaviour. It was submitted that immediately following the school vacating the site and the removal of the gates in October 2007, the fence to the rear of Vicar's Court was vandalised, and it was also believed that the former school buildings were set alight by arsonists who gained access from the path. A request was made that if the path was

designated a right of way, then the Minster should have the opportunity to close it off at night.

29. It was also submitted that that the eastern end of the link path now led onto private land (the school site having been sold to a developer) before leading on to Southwell Footpath No. 12. The Cathedral Administrator queried what the reaction of the developer would be to finding a public right of way on their newly purchased premises.
30. Recent incidents of vandalism and anti-social behaviour resulting from misuse of the path are, whilst regrettable, not matters which question the evidence of use by the public prior to 2001, and have no relevance to my consideration or determination of the Order. If the objectors consider that there is a case for the path to be gated at night, such concerns can be addressed under the provisions of other legislation.
31. The impact of the Order path upon the purchaser of the former school site is also immaterial to my decision as the developer bought the land some time after the use of the path was brought into question. In any event, the proposed site layout of the new housing scheme submitted as part of the OMA's evidence shows that the Order path has been accommodated within the design of the proposed housing scheme and that the developer intends to provide a path from the housing scheme to link to the Order path. I conclude from these documents that the developer is aware of the existence of the Order path.

### **Conclusions**

32. The evidence adduced by the OMA shows that the Order path has been used by the public as of right and without interruption throughout the 20-year period that ended in 2001. There is insufficient evidence of a lack of intention to dedicate a public right of way.
33. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed as the evidence demonstrates, on a balance of probabilities, that a period of time has expired such that the enjoyment by the public of the way raises a presumption that the way between Church Street and Southwell Footpath No. 12 has been dedicated as a public footpath.

### **Formal Decision**

34. I confirm the Order.

*Alan Beckett*

INSPECTOR