

|  |
| --- |
| **Second Interim Order Decision** |
| First inquiry opened on 14 October 2020Unaccompanied site visits undertaken on 13 and 15 October 2020Second inquiry opened on 1 February 2022 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 23 May 2022** |

|  |
| --- |
| **Order Ref:** **ROW/3221975M1** |
| * This Order was made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) and is known as the Suffolk County Council (Parish of Newmarket) Modification Order 2018.
 |
| * The Order was made by Suffolk County Council (“the Council”) on 25 October 2018 and proposed to add a footpath to the definitive map and statement, as detailed in the Order Map and Schedule.
* The Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
 |
| * In accordance with Paragraph 8(2) of Schedule 15 to the 1981 Act I have given notice of my proposal to confirm the Order with modifications.
 |
| **Summary of Decision:**  **The Order is proposed for confirmation subject to the revised modifications set out below in the Formal Decision.**  |
|  |

Procedural Matters

1. I proposed in my Interim Decision (“ID”) of 9 February 2021 to modify the status of the route claimed (“the claimed route”) to a restricted byway and increase the width of the route to 30 feet (9 metres). This Decision should be read in conjunction with my ID with the numbers in square brackets representing particular paragraphs in the ID. For the avoidance of doubt the word ‘highway’ should be taken to have its ordinary meaning. A public road would constitute one class of highway.
2. Network Rail Infrastructure Limited (“NR”) objected to the proposed modifications and also the unmodified part of the Order. The second inquiry was therefore held in accordance with paragraphs 7 and 8 of Schedule 15 to the 1981 Act. Newmarket Town Council (“NTC”) and the applicant (Mr Smy) continue to support the confirmation of the Order along with the modifications proposed in the ID.

**Main Issues**

1. I outlined the relevant matters in relation to the Order, as made, in the ID [4-8]. The main issues now are whether the new evidence and/or argument presented, when taken in conjunction with the previously considered evidence, has a bearing on my conclusion that the claimed route was dedicated as a highway prior to the opening of the railway it crosses over. If I am persuaded to alter my conclusion on this issue, consideration will need to be given to whether the dedication of a highway occurred after the opening of the railway.
2. The three main strands of the objection are that Mr Smy’s application was defective rendering the Order invalid, the evidence issupportive of the claimed route being a private road prior to the opening of the railway or alternatively any public rights that did exist were diverted onto a substitute road on the northern side of the railway.
3. If I conclude that the Order should be confirmed, consideration will then need to be given to the extent to which it is modified.

**Reasons**

***Whether the Order is invalid***

1. NR asserts that Mr Smy’s application of 16 April 2018 to modify the definitive map and statement was invalid for a number of reasons and the Order should not have been made and cannot now be confirmed. In summary, attention is drawn to alleged errors involving the termination points specified for the route, the absence of a claimed width and issues in relation to the application map and its relationship with the Order Map.
2. In support, reliance is placed on three court judgments which considered whether particular applications engaged an exemption in Section 67(3) of the Natural Environment and Rural Communities Act 2006 (“the 2006 Act”). Section 67(6) of the 2006 Act states “*For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act*”.
3. Whilst I gave a provisional view on this matter when opening the second inquiry, I have re-visited the submissions made by the parties before reaching a final conclusion on the invalidity point. NTC has drawn attention to the conclusion reached by another Inspector (see Planning Inspectorate ref. ROW/3206702). However, it is apparent that the matter before the Inspector related to the surveying authority’s decision-making process rather than the validity of any application to modify the definitive map and statement.
4. Schedule 14 to the 1981 Act provides the mechanism for someone to apply for a modification to be made to the definitive map and statement. It provides the applicant with the right to appeal to the Secretary of State should the surveying authority (in this case the Council) determine not to make an Order. An aggrieved party can challenge by way of judicial review a decision at the Schedule 14 stage prior to the Order being made.
5. Irrespective of whether or not an application is made, the Council has a duty under Section 53(2)(b) of the 1981 Act to keep the definitive map under continuous review and make such modifications that appear to them to be necessary. One such event would be the discovery of evidence that a right of way “*subsists or is reasonably alleged to subsist*” in accordance with Section 53(3)(c)(i) of the Act. Whilst an application may serve as the trigger for the making of an Order, a surveying authority does not need to receive an application for it to propose to modify the definitive map and statement. Further, a surveying authority may determine as part of its investigation that the evidence is supportive of the test being applicable to a route that varies to some extent from the one originally claimed to exist. The alignment of the way included in the Order was based on the Council’s conclusion from its assessment of the evidence.
6. A distinction arises where reliance is placed on an exemption found in Section 67(3) of the 2006 Act in order to record a byway open to all traffic. By reference to Section 67(6) of the Act, the decision maker will need to consider whether the application was made in accordance with Schedule 14 to the 1981 Act for the relevant exemption to be applicable. The cases cited by NR relate to applications considered in relation to the 2006 Act and I do not view them to be directly applicable to the present Order.
7. The Council made and advertised the Order in accordance with Schedule 15 to the 1981Act. It now falls to me to determine at the Schedule 15 stage whether the Order should be confirmed on the ground that a right of way subsists. This does not involve examining the validity of the process leading up to the Council’s decision to make the Order. Interested parties were notified of the making of the Order and given the opportunity to make an objection or representation to the proposed modification to the map and statement and to make their case as part of the inquiry process. The point at issue for interested parties is the modification proposed by the Order, which may be different to what was originally requested.
8. Having regard to the above, I find no merit in the assertion that the Order should not be confirmed in light of the issues identified in relation to the application.

***Whether a highway was dedicated prior to the opening of the railway***

1. The early pieces of documentary evidence provide some support for the claimed route being part of the local road network, but I considered the weight of this evidence by itself was not sufficient to find that the route was a highway [69]. Whilst the Wood Ditton Inclosure Award only made provision for a private road, this would not impact upon any pre-existing public rights that existed over the claimed route [19].
2. The new evidence and submissions cover matters relating to the various railway schemes in this locality, namely the Newmarket and Chesterford Railway [22-30] and otherproposals between 1847 and 1852 [31-33]. I accept that railway documents do not provide a definitive guide to the rights that exist over the various ways. As outlined above, there is some earlier evidence which shows the claimed route as part of a through route within the local road network. Therefore, it is not the case that there is no other evidence in support of the route being a pre-existing highway. It also needs to be borne in mind that my conclusion that a public road had been dedicated prior to the construction of the Newmarket and Chesterford Railway had regard to evidence which post-dated the opening of the railway.
3. In terms of the reliance that can be placed on information contained in the railway documents, there will potentially be instances when errors are found in such documents. Additionally, in certain circumstances, there may well be no need to correct an error by the use of Section 7 of the 1845 Railway Clauses Consolidation Act (“RCCA”). NR highlights two references to plot 23 in the book of reference for the Newmarket and Chesterford Railway as being indicative of how errors can arise in these documents. However, it is apparent from looking at the deposited plan and book of reference that there was one plot 23 which was bisected by an occupation road and there is no error on this point. Overall, I place little reliance on the lack of evidence of a modification being made to the railway documents regarding the status of the route.
4. NR have provided additional evidence in relation to a report of an Inspector to the Railway Commissioners in advance of the opening of the railway for passenger trains being approved. In terms of the claimed route, the report states “*There are 27 level crossings on this line of which 11 are for public and 16 for occupation roads. One of the latter at 16 miles and 40 chains from Chesterford is called a Public road on the Parliamentary sections, but the Engineer to the line informed me that this was a mistake and that he had ascertained that it was simply a private occupation road leading to an adjoining farm*”.
5. The Inspector further outlined that the public crossings were provided with gates that close across both the road and railway with a gatekeeper and the occupation roads hadgates which close across the road. Reference is also made in the report to another location where two crossings had been combined but the engineer could not confirm whether this had been done by legal process. The Inspector additionally states that any change which diminishes the number of level crossings will in his opinion add to the safety of the line. It was confirmed that the railway comprised of a double line.
6. The report contains information that is supportive of an error with the crossing being described in the book of reference for the Newmarket and Chesterford Railway as a highway. The issue to be determined is the weight to be attached to this piece of evidence and how it impacts upon the value of the railway documents. It cannot be determined from whom the engineer obtained information regarding the status of the route, and it is potentially hearsay evidence which the Inspector accepted.
7. The purpose of the inspection was to ensure that the railway was safe to open for passenger trains. On the basis of what was on the ground and the statement of the engineer there may well have been no need to undertake any further investigation. There is certainly nothing to show that any other enquiries were made, or consultations undertaken with interested parties such as the surveyors of highways. I note that the report is dated one day before the railway opened for passenger trains.
8. In terms of the sidings that evolved near to the crossing it cannot be determined when the number of lines increased from the map evidence. If there had been more than two lines to cross when the railway opened, I would expect this to have been mentioned in the Inspector’s report. Given the information in the report it is unlikely that it would have considerednecessary to comply with the requirements of Section 47 of the RCCA at the crossing. However, this would not removeany existing public rights over the crossing. Nor would it significantly diminish the value of the other evidence in support of the claimed route being a highway. As noted in the ID [67], there is later evidence of a gate keeper being employed at this location.
9. A key factor is the difference between the Inspector’s report and the scrutiny given to the production of the railway documents. Whilst NR questionsthe degree to which Parliament scrutinised issues such as the highways shown on the deposited plans, there would have been extensive consultations undertaken at a local level, including with landowners and the surveyors of highways [29]. A notice alsoappeared in a local newspaper and the London Gazette in relation to the proposed railway which gave details of where the relevant documents could be inspected [22]. It would have been in the interests of the promoters of railway bills to accurately identify the public roads in a parish given the costs involved in making provision for them to cross the railway either by a bridge or on the level. Further, consent had to be obtained where a level crossing was proposed. For the railway company to have listed a road as having public status there should have beensome basis for them originally doing so.
10. The new information should be factored into the balancing exercise. Whilst it provides support for the claimed route being a private road, given the factors outlined above, it does not fundamentally change my view on the weight to be attached to the other railway documents.
11. Turning to the later railway documents of 1847 [31-32]. Although these proposed railways were not ultimately built, they were still subjectedto local and Parliamentary scrutiny. The different numbering used for certain plots is suggestive of reliance not being placed on the documents produced for the Newmarket and Chesterford railway. In terms of the status of the claimed route, this is consistently listed in the books of reference for the later proposals as a public road [31]. A difference does arise in the description of the continuation of the claimed route to the south in the later railway documents as a public road. This may indicate that the later documents are in error, but it could equally be reflective of an error with the listing of plot 30 in the Newmarket and Chesterford Railway book of reference. The annotation of the route leading to Kirtling is not indicative of it being viewed as an occupation road to a farm or a cul de sac. The route continuing to the south of the claimed route is presently a public road (Cricket Field Road).
12. The Newmarket Railway Company signalled its intention in 1851 to apply to Parliament to make amendments to the earlier Railway Acts [33]. Nothing has been provided to change my view that the relevant notice and deposited plan provide some support for the claimed route being a highway. It refers back to the plot numbered 29, which is shown extending over both sides of the proposed railway on the deposited plan for the Newmarket and Chesterford Railway. However, as outlined in the ID, there is an issue that serves to limit the weight of the 1851 documents.
13. I found in the ID that various newspaper articles provided support for the route having public status [51-57]. They provide evidence of widespread use of the crossing. Whilst it is possible that a proportion of the historical public use was on a permissive basis, no evidence has been provided to demonstrate that this was the case. There is evidence of continued use of the claimed route during the twentieth century [64-65]. Some of the newspaper reports are indicative of an acceptance by the railway company that the public were using the route and consideration was given to the adoption of additional safety measures. It is less likely that such measures would have been considered necessary if the route only provided a private means of access. One of the reports records that a man was stationed at the crossing virtually all of the time to protect the public [56]. There are additional pieces of evidence in relation to the manning of the crossing [66-67].
14. I noted in the ID the evidence in support of the claimed route being an occupation road [34-36 and 48-50]. These documents need to be weighed into the overall balancing exercise. The weight attached to the 1878-79 railway documents will be limited to some extent given that the proposal in relation to the claimed route was not included in the Act.

***Whether the public rights were diverted onto a substitute road***

1. Further submissions have been made in relation to the substitute road argument put forward by NR at the first inquiry [37-47]. In essence there are two issues that need to be resolved, namely the capability of the railway company to divert the route and whether this actually occurred. On the first matter, NR clarified its position on the relevant statutory powers and paragraphs 44 and 45 of the ID need to be reviewed in respect of this matter (see below). In terms of the second issue, in the absence of specific documentation on this matter, regard should be given to the available evidence to determine what is likely to have happened. I consider that little reliance should be placed on the extent of the railway company’s ownership during the period it is alleged that provision could have been made for a substitute road. It is unlikely that this would have prevented the diversion of the route.
2. The general power to divert roads is found in Section 16 of the RCCA [38] and this needs to be read in conjunction with Sections 53 and 56 of the Act. NR’s clear position at the second inquiry is that a period of seven years from the granting of royal assent for the Newmarket and Chesterford Railway Act of 1846 (“N&CRA”) was permitted for the completion of the works in line with Section 25 of the Act (in this case by July 1853). It is asserted that it is therefore not necessary to show that the substitute road was constructed when the railway was opened to all traffic.
3. Section 53 of the RCCA allowed for the provision of a temporary substitute road where works would have interfered with the road. If the road could not be restored, Section 56 of the Act permitted the road to be permanently diverted. A permanent diversion needed to be undertaken within 12 months unless it was extended by the written consent of the trustees or the parties with responsibility for managing the road.
4. I expressed doubts in the ID regarding whether the construction of a substitute road would fall within the powers of Section 16 of the RCCA and Section 25 of the N&CRA in this case. I have revisited this matter in light of the information presented at the second inquiry.
5. The opening part of Section 16 states: “*Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, herein-after mentioned, to execute any of the following works…”*  This makes it clear that the various works could be carriedout for the purpose of constructing the railway or the associated accommodation works.
6. Section 25 of the N&CRA states: “*the Railway and Branch Railway shall be completed within Seven Years from the passing of this Act, and on the Expiration of such Period the Powers by this or the recited Acts… shall cease to be exercised…*”. This gave the railway company a period of seven years to complete the railway.
7. I interpret Section 16 to permit various works to be undertaken for the purpose of constructing the railway. This view is supported by the case of *R v Wycombe Railway Company 1867*. The implication to be drawn from Section 16 is that once the railway had been constructed the powers cease to be operative. The opening of the railway to passenger traffic on 4 April 1848 indicates that the construction works for the railway were complete, or substantially complete, by that date and this is supported by the Railway Inspector’s report. Section 25 of the N&CRA gave the railway company seven years to complete the railwaybut it didnot expressly permit the undertaking of works following the completion of the railway. Clearly Sections 53 and 56 permit the temporary or permanent diversion of roads in light of works undertaken in relation to the railway.
8. The further exploration of this matter leads me to move away from the doubt I expressed in the ID to a firmer view. I now consider that it is likely the Section 16 powers ceased to be applicable following the completion of the works to construct the railway. Although NR draws attention to works in connection with the sidings, it is acknowledged that sidings could be constructed on land owned by the railway company without the need for an authorising Act. It is also uncertain when the expansion in the number of lines near to the crossing commenced.
9. In terms of what actually happened, I noted in the ID the evidence following the opening of the railway and the continued existence of the claimed route [39]. This is distinct from the position with the road numbered 26 in the deposited documents for the Newmarket and Chesterford Railway. There is later evidence which is supportive of the claimed route being a highway and uncertainty regarding when the road on the northern side of the railway was constructed. Additionally, the Railway Inspector recorded that the engineer had ascertained that the route was an occupation road. It is therefore unlikely that action would have been taken at the time by the railway company to construct a replacement public road. Nor is there anything in the Inspector’s report to suggest that the crossing was not available.
10. In light of the above, I now find there to be little merit in the substitute road argument pursued by NR.

***Conclusions***

1. I have re-visited the conclusions I reached on the various pieces of evidence [69-73] in light of the new evidence and submissions of the parties. Some weight should be attached to the Inspector’s report shortly before the railway opened to passenger trains. It is supportive of the claimed route being a private road. However, bearing in mind the other factors considered in my assessment of this evidence, I do not find that it outweighs the documents in relation to the Newmarket and Chesterford Railway. The railway documents as a whole provide significant support for the route having public status and they consistently define the route as a public road.
2. The weight of the early evidence may not be sufficient by itself for the route to be viewed as a highway [69]. It nevertheless provides some support for the route being a highway and is consistent with the subsequentrailway documents. However, clearly the inclosure award only made provision for the route to be a private road. There are a few additional documents, principally the 1849 conveyance and 1878-79 railway documents, which are indicative of private status but these need to be weighed against the other pieces of evidence that point in a different direction.
3. The evidence of public use after the railway was constructed is consistent with the statements made in the railway documents in support of the route being a highway. Given the earlier evidence, it is reflective of the route being an existing highway. I therefore do not need to consider it separately in terms of whether it supports the dedication of a highway after the construction of the railway. In such cases, it is often not possible to say when the dedication occurred. The documents in connection with the Newmarket and Chesterford Railway are supportive of the dedication taking place at some point prior to the construction of the railway and that the route was viewed at the time as a public road. Therefore, it would have been dedicated either before or after the inclosure award.
4. I now find there to be little merit in the substitute argument pursed by NR in light of my interpretation of the legislation and consideration of the evidence.
5. Overall, I conclude that the evidence as a whole is more supportive of the claimed route being a historical highway which was dedicated at some point in time prior to the construction of the railway. Additionally, it remains my view that on balance this historical highway encompassed public vehicular rights and the route should now be recorded as a restricted byway.

***Modifications***

1. In light of my conclusion above, no change should be made to my proposed modification to the status of the claimed route.
2. It was generally accepted by the parties at the second inquiry that the alignment of the claimed route shown on the historical maps followed a straight course. In contrast, the Order Map shows a kink in the route towards point B, which appears to reflect the current layout of the crossing.There is nothing to suggest that there has been a legal change to the alignment of the claimed route. Accordingly, the appropriate course of action would be to modify the Order so that it correctlyrecords the historical alignment of the route. These additional modifications will need to be advertised in accordance with paragraph 8 of Schedule 15. This will provide the parties with the opportunity to comment on the extent of the relevant modifications to ensure that the route is accurately described in the Order.
3. I concluded that the width of the claimed route should be specified as 30 feet (9 metres) wide [74]. Whilst the inclosure award only set out a private road, it had the effect of making provision for the route to have a width of 30 feet. I have considered this matter afresh in light of the objection pursued by NR.
4. The first issue is that it is uncertain when the route was dedicated. It is possible that the highway pre-dated the inclosure award and had a greater or lesser width than 30 feet. Secondly, the statutory process involving the construction of the railway and the provision of a level crossing is likely to have had an impact on the width of the route. It is shown subsequently narrowing on some of the plans where it crosses the railway.
5. I now take the view on balance that it is not appropriate to place any significant reliance on the width specified in the inclosure award. In the absence of any other evidence regarding the historical width of the route, I need to determine what would be a reasonable width for a restricted byway in this location. The view of NR, who clearly have expertise in such matters, is that a total width of 14 feet (4.2 metres) would be appropriate for safety reasons and to ensure the operational efficiency of the railway. In practical terms this would involve the provision of two gates with a width of 10 feet and 4 feet respectively to separate the different types of users. I agree that this would be an appropriate width for the claimed route in the circumstances.
6. I outlined the issue regarding gates in the ID [75]. NR confirms that it has statutory powers to erect suitable gates, and this should address any concerns about unrestricted access at the crossing. It is therefore appropriate for the references to the present gates to be removed from the Order Schedule. The siting of the replacement gates would be a matter for NR to determine.

**Overall Conclusion**

1. Having regard to these and all other matters raised at the inquiries and in the written representations I conclude that the Order should be confirmed subject to revised modifications.

**Formal Decision**

1. I propose to confirm the Order subject to the following modifications:
* Delete all references to “*footpath*” and insert“*restricted byway”*.
* Delete “*a gate at*” from the second and third lines in Part II of the Order Schedule.
* Delete “*11 metres to a gate and a*” from the third line in Part II of the Order Schedule and insert “*approximately 18 metres to the”.*
* Delete the final three lines of Part II of the Order Schedule and insert “*Width: 4.2 metres (14 feet)”.*
* Include the notation for a restricted byway on the Order Map rather than the notation for a footpath and amend the map key accordingly.
* Show the restricted byway by means of a revised alignment towards its north-western end on the Order Map.
1. Since the confirmed Order would affect land not affected by the Order as submittedI am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

**Inspector**

**APPEARANCES**

|  |
| --- |
| **For NTC:**  |
| Ms M. GoldenShe called: Mrs R. Emrys-Roberts | Counsel appearing for NTC |
| **Additional Supporter:** |
| Mr M. Smy**For NR:** Mr J. LopezHe called:Mr S. Day  | Applicant Counsel appearing for NRLiability Negotiations Manager  |
|  |  |

**DOCUMENTS TENDERED AT THE SECOND INQUIRY**

1. Alignment plans supplied by the Council
2. Details from NR regarding the number of railway lines shown on maps
3. Closing submissions of Mr Smy
4. Closing submissions for NTC
5. Closing submissions for NR

