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# Order Decision

Site Visit on 7 June 2016

**by Sue Arnott FIPROW**

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

**Decision date: 23 June 2016**

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## **Order Ref: FPS/X2600/7/113**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Norfolk County Council (Holt) Modification Order 2015.
- The Order is dated 14 August 2015. It proposes to modify the definitive map and statement for the area by recording a restricted byway from the junction of Riverside Road and Thornage Road near Letheringsett southwards for approximately 464 metres in the Parish of Holt, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding and three representations in support when Norfolk County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

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

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## **Preliminary Matters**

1. I visited the site on Tuesday 7 June 2016 accompanied by Mr Sharman on behalf of Norfolk County Council<sup>1</sup> (NCC), Mr Payne (the applicant), Ms Sands (of Letheringsett Parish Council) and local residents Ms Luker, Mr Brettle, Ms Payne and Ms Ford.
2. The lane in question is known locally as Stone Brig Lane, Harry Coe Lane and Stibbard Lane. Here I shall refer to it simply as 'the lane'.

## **The Main Issues**

3. The Order was made under the Wildlife and Countryside Act 1981 on the basis of events specified in sub-section 53(3)(c)(i). The main issue here is whether, on a balance of probability, the evidence shows that a public right of way has been established along the Order route.
4. If the way is shown to have once been a public carriageway, the evidence indicates that the right of the public to use it with mechanically propelled vehicles will have been extinguished as a result of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) so that the appropriate categorisation for the road would now be 'restricted byway'<sup>2</sup>.
5. In fact no evidence has been submitted to challenge the existence of a restricted byway along the Order route. Even so, I must be satisfied that there is sufficient

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<sup>1</sup> Although it concluded that the evidence was sufficient to make the Order, NCC has decided to take a neutral stance as regards its confirmation

<sup>2</sup> A restricted byway is a highway over which the public has a right of way on foot, on horseback or leading a horse, and a right of way in or on vehicles other than those which are mechanically propelled.

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evidence to support the conclusion that a public right of way does subsist if I am to confirm the Order.

6. In his objection to the Order on behalf of the Open Spaces Society, Mr Witham does not oppose the recording on the definitive map and statement of a restricted byway along the Order route. The focus of his concern is the way in which the Order schedule describes the Order route and its failure to expressly record "no limitations or conditions". I address these two issues below.

## **Reasons**

7. The evidence in this case is in two parts. The first is the historical documentary evidence which consists of maps, awards, plans and extracts from historical publications dating from the mid-eighteenth to the mid-twentieth centuries. The case in support of the Order rests primarily on this evidence and I propose to examine this first.
8. The second bundle of supporting material consists of evidence of recent use collected by the applicant and submitted to NCC to accompany his application for a definitive map modification order in January 2014. This takes the form of user evidence forms from 31 individuals who claim to have used the Order route for varying periods, mostly on foot but some on a bicycle or with a horse.

## ***Historical evidence***

9. There is clear evidence of a road along the line of the Order route and beyond to the Holt-Thornage Road in a map produced by Faden in 1779. However subsequent evidence tends to cast an element of doubt on the conclusion that this was used as a public highway in later years.
10. By 1826 on his map of Norfolk Bryant showed the Order route but not the remainder of the road recorded by Faden. In the intervening years, an enclosure award of 1810 had set out the Order route as a private road for the use of certain individuals but only the length of the Order route A-B-C, not further south than C. The tithe map of 1838 and apportionment of 1840 again recorded this as a private road; at this time it also served a residential property along its length, said to have been the home of Harry Coe.
11. By the turn of the twentieth century, the Ordnance Survey (OS) map of 1905 shows the lane A-B-C was still clearly in existence although Mr Coe's house had gone. However the records of the 1910 Finance Act show the lane excluded from adjacent hereditaments; this is usually an indication of a public right of way and often a vehicular highway, although there may be alternative explanations.
12. A title plan in a conveyance dated 11 October 1958 referred to the Order route as a 'driftway', and aerial photographs of 1946 and 1988, together with the OS map of 1970, show that throughout the twentieth century the lane appears to have remained virtually unchanged since its early origins.
13. Examining all these documents, I find the evidence to support an historical public carriageway quite thin but nothing has been submitted to challenge that conclusion. Faden's map clearly shows it was once part of a through-route and an integral part of the local highway network. No evidence of formal closure has been produced. In the absence of any submissions to the contrary, on a balance of probability I conclude the Order route is still a public carriageway but the 2006 Act has reduced the public's rights to those associated with a restricted byway.

***Evidence of recent user***

14. Having reached the conclusion that the Order route does carry an historical public right of way, it is not necessary for me to examine in detail the evidence from users in relatively recent times submitted with the application. However for completeness I will set out in brief my main findings.
15. The requirements for the presumed dedication of a public right of way under statute are set out in Section 31 of the Highways Act 1980 (the 1980 Act). This requires use of the claimed route by the public, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public path. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public right of way will be deemed to subsist.
16. In the absence of any other notable challenges, it appears the application itself brought into question the status of the way, thus establishing a relevant period of January 1994 to January 2014.
17. Of the 31 original claimants, 23 provided additional evidence to clarify their initial forms. 20 of these people say they have used the Order route throughout the whole 20 year period although 5 say they, or other family members, received permission from the Cozens-Hardy family.
18. It appears that until recent years the Cozens-Hardy Estate owned fields adjacent to the lane, but it is far from clear that ownership included the lane itself. Indeed the Land Registry records no registered owner for the lane. Whilst I might have discounted the use claimed by the 5 who were given permission, that would only be necessary if the permission had been granted by or on behalf of the owner which may not be the case here. However, even if the use claimed by these five people were to be discounted, I would nonetheless find sufficient evidence remains to show use by the public as of right and of the route as a cul-de-sac used regularly for dog-walking and other recreational purposes.
19. Some of the claimants refer to using the Order route as part of a circular walk though it is not entirely clear in which direction they walk from point C. Between 2004 and 2014 a Countryside Stewardship Scheme was in operation through which public access was made available within a field at the southern end of the lane. Whilst walking within this field could not have created a public right of way, any use of the Order route to reach the field would have been 'as of right' and therefore contribute to the body of evidence demonstrating use by the public.
20. Having found sufficient evidence to raise a presumption of dedication as a public path, the next question would be whether there is evidence that the landowner took steps to make clear that dedication was not intended. However, against a background of unknown ownership of the lane, no notices deterring public use have been reported and no other relevant evidence has been submitted of a lack of intention to dedicate at any time in the past.
21. Again, with no contrary evidence to weigh against that provided in support, I conclude that the evidence of claimed use over the relevant 20 years would be sufficient to establish a public right of way on foot, although it could equally be attributed to the much earlier dedication demonstrated by the historical documentation.

### **Other matters**

22. Mr Witham's first point of objection concerns the reference in the Order schedule to two separate measurements used to describe the lane: the width of the route between boundary features (varying between 4 and 6.5 metres) and the 'usable width' (varying between 2.5 and 3.5 metres).
23. Whilst NCC submits that the usable width is simply a physical description of the route, the objector argues that it is both unnecessary and irrelevant, and that the definitive statement is not intended as a maintenance record.
24. I understand NCC's desire to capture as much information as possible and that the extent of the usable width may be helpful in practical terms, but the definitive statement is intended to record the extent of the public's *rights*. Consequently I agree with Mr Witham that it is the measurement between the boundaries recording the fullest extent of the highway that is the relevant detail to be recorded<sup>3</sup>. I therefore propose to modify the Order by removing reference to the usable width.
25. Mr Witham further argues that the words "No Limitations and Conditions" should be included in the schedule so as to make a positive statement that none exist and to avoid disputes in future. NCC does not oppose this although it is not its normal practice.
26. I recognise that a clear statement that no limitations exist is generally regarded as good practice where it can be confidently stated. Here, where the claimed highway came into existence long ago, there is an arguable case that a gate of some sort might have been in place at point A (as suggested by the tithe map). I make no finding on that either way since the point has not been argued and there is very little detailed information to assist. In short, whilst I agree there are no limitations or conditions affecting this route that have been shown subsist on a balance of probability, I am not persuaded that the Order schedule should be modified to include a positive statement to this effect.

### **Conclusion**

27. Having regard to the above and all other matters raised in the written representations, I propose to confirm the Order with the modifications referred to in paragraph 24 above.

### **Formal Decision**

28. I confirm the Order subject to the following modifications:

- In the Order schedule, in Part I and Part II, delete the words "with a usable width varying between 2.5 metres and 3.5 metres".

*Sue Arnott*

**Inspector**

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<sup>3</sup> Had the case relied on presumed dedication based on recent user, then the used (not usable) width may have been the appropriate measurement.

**Section 53 of the Wildlife and Countryside Act 1981  
Modification Order for the addition of a restricted byway  
in the Town of Holt**

Order Route - Restricted Byway — V — V — V — V —  
Full width metres (usable width metres)

Norfolk County Council  
County Hall  
Martineau Lane  
Norwich  
NR1 2SG



Scale 1:2,200

