



Order Decision

Site visit made on 10 January 2018

by **Alan Beckett BA MSc MIPROW**

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

Decision date: 15 February 2018

Order Ref: FPS/V3500/7/323R

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Suffolk County Council (Thingoe Rural District Definitive Map and Statement) (Parish of Great Barton) Modification Order 2016.
- The Order is dated 4 July 2016 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 3 objections outstanding when Suffolk County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I carried out an unaccompanied site visit on Wednesday 10 January 2018.
2. This is a re-determination of the Order. The Order had been previously considered in March 2017 by means of written representations, and the Inspector's decision which resulted had been quashed by Order of the High Court.
3. The application made to the Council was for the addition of a public footpath to the Definitive Map and Statement running from A to D via B and C and then continuing from D in a generally easterly direction to the U6320. The Order made by the Council (if confirmed without modifications) would only add a footpath on the alignment A – B – C – D. One of the objections to the Order was from the applicant, Mr John Andrews, who argued that the Order should have been drafted to include a route east of D to the U6320 to reflect his application. The remaining objections to the Order (the landowners) contended that the proposed alignment A – B – C did not reflect the description of the path set out in the 1805 inclosure award; the text of the award could be interpreted in such a way to describe a straight line path between point C and the U6318 near to the parish church¹.

The Main Issues

4. The main issue is whether the evidence shows that a public right of way on foot subsists on the route shown in the Order map on the alignment A – B – C – D.

¹ Part of the church is just visible above the figure 266000 at the left-hand edge of the Order map

a second issue is whether a public right of way on foot subsists between point D and the U6320. It is common ground between the parties that the primary source of evidence in this case are the documents which relate to the statutory inclosure of land in Great Barton in the early years of the nineteenth century.

Reasons

5. Inclosure of open land within Great Barton was carried out under the 1805 Award which was made under a local Inclosure Act of 1802. None of the parties has submitted a copy of the 1802 Act although it is assumed that the 1802 Act incorporated the provisions of the General Inclosure Act 1801. It is not disputed by any party that section 10 of the 1801 Act provided inclosure commissioners with the authority to award and set out public footpaths over the land being inclosed.
6. In relation to Great Barton the relevant entry in the 1805 Award reads as follows: *"One other foot or Church Path of the breadth of four feet beginning at the Shrub Gate and proceeding in a direct line across the fifth Allotment made to Charles Lanchester to the seventeenth Allotment made to Sir Thomas Charles Bunbury Baronet on the East side and at a distance of [here there is a gap in the text of the award] yards from the old Church path and crossing the fence dividing the said allotments and proceeding in the same direction across the said seventeenth allotment made to the said Sir Thomas Charles Bunbury till it joins the thirdly above described Public Road nearly opposite to the Church"*.
7. The award plan shows the footpath awarded by means of a double peck line which is in turn coloured ochre. The annotation "*2nd public footpath*" is attached to that section which equates to points A – B on the Order plan. The path is then shown to run generally northward to point C along the eastern side of the seventeenth allotment made to Sir Thomas Charles Bunbury before following the C – D alignment to *'the Shrub Gate'* which is accepted as equating to point D. The award plan shows the awarded footpath connecting with the *'6th private road'*. Other than the *'6th private road'*, no other means of onward travel between Shrub Gate / Point D and the U6320 is shown on the award plan.
8. The landowners contend that the route described in the award is not consistent with the route depicted in the award plan. In the landowners' view the award described a route which can only be correctly interpreted as a straight line route in contrast to the obvious 'dog-leg' alignment shown in the award plan. The objectors contend that the text of the award describes a path which on leaving the Lanchester land, crosses a fence and then continues in the same direction. In the landowners' view the description given is of a path which runs in a straight line and not the dog-leg to the south-west shown in the award plan.
9. The landowners contend that if the dog-leg shown in the award plan was intended to be part of the *'2nd public footpath'*, then that feature should have been adequately described in the text of the award. Furthermore, if the award text and the award plan were describing two different paths it would be necessary to determine which route the inclosure commissioners intended to set out for public use. As a means of determining what the inclosure commissioners may have set out, the landowners draw attention to the depiction of the land in maps produced subsequent to the inclosure award. The 1818 Ordnance Survey preparatory drawing and the 1-inch to 1-mile map of

1837 both show a path in the vicinity of the Order route but without any evidence of the dog-leg between C and B. It is suggested that the alignment that may have been in use post-inclosure was a route parallel to A – B but which ran in a direct line to the south of the field boundary between C and the U6318.

10. It is the landowners' case that '*the old Church path*' was the route A – B since '*the old Church path*' was stated to be an unspecified distance from, but parallel to, the new route being set out. The landowners contend that the route which the commissioners intended to set out was C to the U6318 parallel to the then existing path B – A. It is submitted that this is consistent with what was shown on post-inclosure OS mapping. In the landowners' view this is a rational conclusion to a consideration of the award and the map and an attempt to make sense of the discrepancy between the text of the award and the route shown on the award map.
11. The text of the award in relation to the '*2nd public footpath*' and the failure of the inclosure commissioners to specify a distance between '*the old Church path*' and the path being set out by them has given rise to some uncertainty about the intentions of the inclosure commissioners. However, it seems clear that prior to the inclosure process there was a path in the vicinity of the Order route which the inclosure commissioners thought prudent to re-align, at least in part. I concur with the landowners that part of '*the old Church path*' was to be stopped up and a new path set out in its place. Where I differ with the landowners is that I consider that '*the old Church path*' was a direct route over the seventeenth allotment from point C to the U6318 and the alternative new route set out by the inclosure commissioners was C – B – A.
12. The text of the award shows that the awarded path ran over the fifth allotment "*to the seventeenth allotment....on the East side and at a distance of [gap in text] yards from the old Church path*". The reference to the path being '*on the East side*' can only be a reference to the path running along the boundary of the seventeenth allotment as shown in the award plan; if the awarded path had been a straight line route there would have been no need to state that the path ran '*on the East side*' of the seventeenth allotment.
13. I acknowledge that having described the new path as running on the East side of the seventeenth allotment, the text of the award then goes on to say that the path crosses the boundary between the allotments, which it would have had to in order for it to be able to run '*on the East side*' of the seventeenth allotment. In my view, the description of the path as being '*on the East side*' of the seventeenth allotment makes the subsequent reference to crossing the boundary fence extraneous as the text implies that the boundary fence had already been crossed.
14. It is not known what distance the inclosure commissioners considered should separate '*the old Church path*' from the new path. However, if '*the old Church path*' had continued from C across what became the seventeenth allotment to the U6318 then the description of the path as running '*on the East side and at a distance of [gap in text] yards from the Old Church path*' would indicate that the new path ran south from C for an unspecified distance on the east side of the seventeenth allotment before turning north-west to run in the same direction as '*the old Church path*' had done. This interpretation accords with what is shown in the award plan of the path taking a southerly turn along the

- eastern side of the seventeenth allotment. I consider the award text and the award plan to be consistent with *'the old Church path'* having run pre-inclosure from point C to the U6318 with that route being done away with and replaced by the inclosure commissioners with a route on the C – B – A alignment.
15. I do not consider that there is an irreconcilable discrepancy between the text of the award and the award plan. There are anomalies within the text irrespective of which way it is read, however it is possible for the award text to be construed as intending to describe what was graphically shown in the award plan. In any event, if there is uncertainty about the description of the path in the award text, the award map provides a visual representation of what the inclosure commissioners had done with regard to ordering the post-inclosure landscape.
 16. The post inclosure documentary evidence considered above suggests that a path on the C – U6318 alignment survived the inclosure process or at least remained a visible feature in the post-inclosure landscape. The boundary hedge adjacent to which a path was shown in 1818 and 1837 and on subsequent OS maps remains in place today, although there is no evidence of recent use of such a path and there was no sign of such use at the time of my site visit. However, the setting out of a public footpath on the A – B – C – D alignment under the 1805 Award provides conclusive evidence of the existence of a public right of way on foot on that alignment.
 17. The applicant contends that there must have been some means for the public to have reached the Shrub Gate / point D from the east in order for the awarded path to have some public utility. It is the applicant's contention that access to point D from what is now the U6320 could only have been achieved via the *'6th private road'* as that was the only route shown in the award plan to provide a link between the collection of dwellings at East Barton and the Shrub Gate.
 18. The 1805 inclosure award described the *'6th private road'* as follows: "One other PRIVATE ROAD of the width of twenty one feet as far as a New Fence is required branching out of the seventh described Public Road at the North East corner of the first allotment hereby made to the said Charles Lanchester and proceeding in its present course along an ancient lane leading into Shrub Field aforesaid and through the said field to the Gate leading into Shrub Field aforesaid and through the said Field to the Gate leading into Shrub Wood for the use and convenience of the said Sir Thomas Charles Bunbury and Charles Lanchester their Heirs, tenants and assigns".
 19. If the eastern outlet for the *'2nd public footpath'* had originally been along the *'ancient lane'* mentioned in the above description, then for those public rights to have survived the inclosure process it would have been necessary for the commissioners to have appointed those rights as they would otherwise have been extinguished by the operation of section 11 of the 1801 Act. There is no evidence in the 1805 award that public pedestrian rights were awarded over any part of the *'6th private road'*; it was awarded as a private road and not as a private road and public footpath.
 20. In the absence of the retention of a public right of way on foot over the ancient lane that made up the *6th private road*, any pre-inclosure public rights would have been extinguished under the provisions of section 11 of the 1801 General

Act. Consequently the 2nd awarded footpath became a cul-de-sac at its eastern end.

21. I saw on my site visit that the '6th private road' set out in the inclosure award is no longer visible on the ground. There is no physical trace of a route between the U6320 and point D and no evidence of use of that route has been submitted from which it could be concluded that a public right of way on foot had been dedicated either under the statutory provisions or at common law.
22. I am not persuaded by the applicant's submission that the case of *Eyre v New Forest Highways Board* [1892] ('*Eyre*') has applicability to this case; the issue in *Eyre* was the status of a route which linked two cul-de-sac public roads with the court finding that the connecting route should be assumed to carry the same public status. In this case the question is of the status of the continuation from the cul-de-sac at D; given that any pre-inclosure public rights over the 6th private road would have been extinguished as they were not awarded and that there is no evidence of use of the continuation of the path, there is no evidence from which it could reasonably be concluded that a public right of way subsists between point D and the U6320.
23. Although it may seem anomalous that the 1805 award would result in the retention of a public right of way which was a legal cu-de-sac at its eastern end, this is the inescapable conclusion as to what the inclosure commissioners achieved.

Conclusions

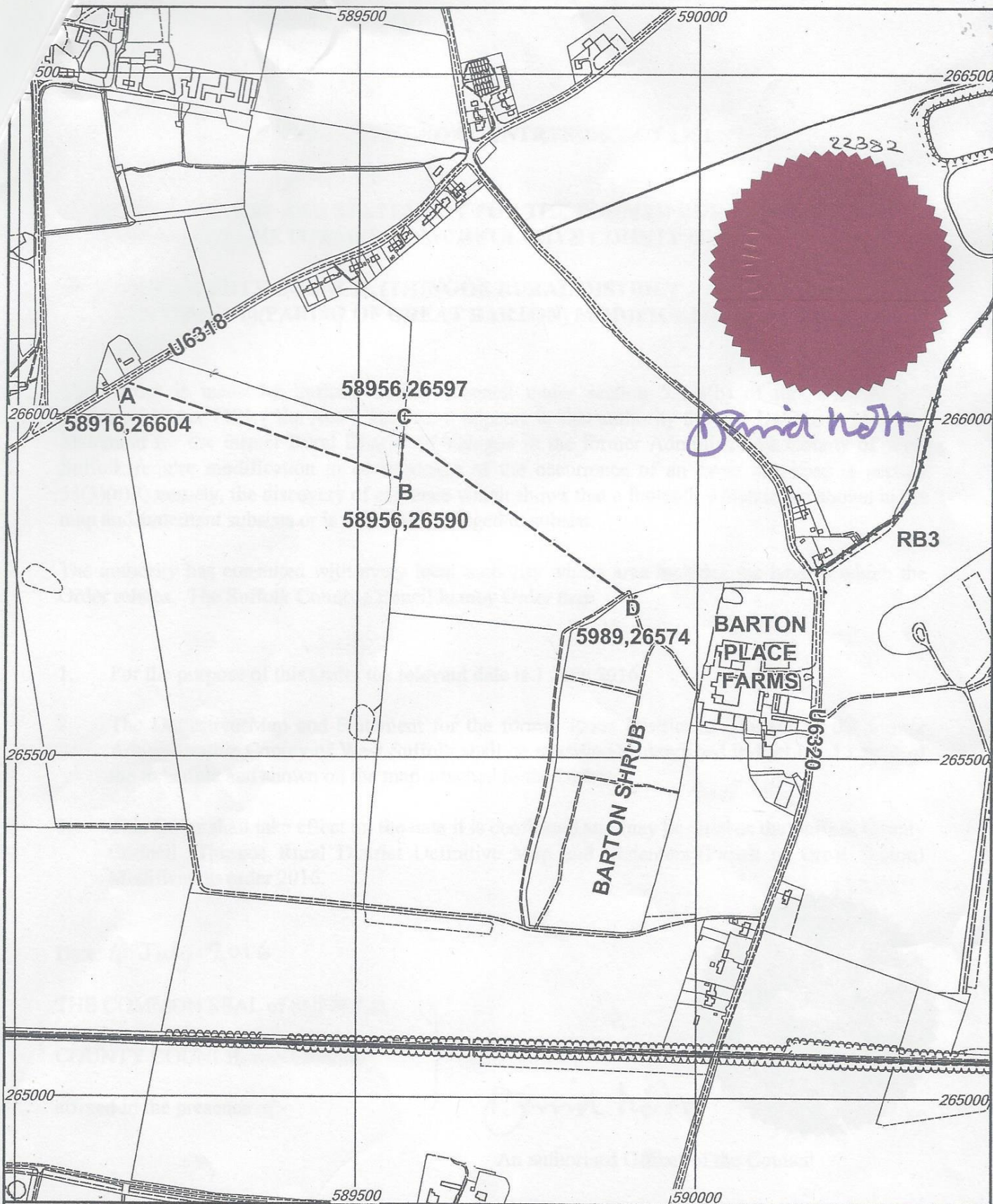
24. I conclude that the evidence is sufficient on a balance of probabilities, to demonstrate that a public right of way on foot subsists over the Order route. Having had regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal decision

25. I confirm the Order.

Alan Beckett

Inspector



PROPOSED GREAT BARTON FOOTPATH 21

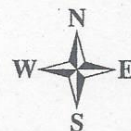


Director of Resource Management
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----- Proposed Public Footpath (A-B-C-D)

-v-v-v- Restricted Byway

Scale 1:7500



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