



Order Decision

Site visit made on 4 December 2018

by **K R Saward Solicitor**

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

Decision date: **11 December 2018**

Order Ref: **ROW/3200513**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as Norfolk County Council (Trunch Restricted Byway No. 9) Modification Order 2017.
- The Order is dated 28 July 2017 and proposes to modify the Definitive Map and Statement for the area by upgrading a length of footpath to a restricted byway as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Norfolk County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Background

1. The Order route is known as Postle's Lane which connects Brewery Road to the south and Southrepps Road to the north. The route was added to the Definitive Map and Statement in 1988 as a footpath recorded as FP9 Trunch following a Modification Order made on the basis of evidence of public use on foot. The recorded width ranges from an average of 3 metres to 5.5 metres. If confirmed, the Order now made would upgrade FP9 to a restricted byway at greater width.

Main Issue

2. The Order has been made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') in consequence of the discovery of evidence as provided in section 53(3)(c)(ii).
3. The main issue is whether the evidence discovered, when considered with all other relevant evidence available, is sufficient to show that the footpath ought to be shown on the Definitive Map and Statement as a restricted byway.

Reasons

4. The application for a restricted byway along the Order route relies upon historical documentation.
5. At the time FP9 was added to the Definitive Map and Statement the County Council as Order Making Authority ('OMA') considered there to be insufficient documentary evidence of a public footpath based on the Tithe Apportionment and Map alone. Further documentary evidence has now been uncovered which prompted the current Order to be made.
6. Section 32 of the Highways Act 1980 requires that documentary evidence is taken into consideration 'before determining whether a way has or has not been dedicated as a highway' – and that such weight is given to this evidence as

'justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it was produced.'

7. A restricted byway allows the public a right of way on foot, on horseback (or leading a horse) and in/on vehicles other than mechanically propelled vehicles. This includes cycles and horse-drawn vehicles, but not motorised vehicles.
8. For the Order to be confirmed, evidence is required on the balance of probabilities that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a description. The burden of proof lies with the applicant who asserts that the existing footpath should be upgraded in status as a restricted byway.
9. One objection was received from the affected landowner.

Tithe records

10. Trunch Tithe Map 1839 is a second class map which clearly shows the Order route. It is listed in the Apportionment of 1840 under the heading of 'Public Road' as 'Howe's Lane' with no commuted tithe apportioned to it. These factors are consistent with this being a public highway, but tithe maps and apportionments are rarely conclusive evidence of the status of a road. It gives a strong indication that the road is a public highway although in isolation it is not enough to show the existence of highway rights as the applicant and OMA recognise.

Finance Act 1910 records

11. The extract provided from the Finance Act Map held at the National Archive is based on the large scale Ordnance Survey ('OS') map and identifies the Order route as Postle's Lane. Only the edges of hereditaments are coloured on the map. The Order route is uncoloured. The northern half runs between two different coloured hereditaments. The colouring stops midway along the sides of the route and reappears at its southern tip next to the junction with Brewery Road. This indicates that the southern half of the Order route dissects a single hereditament (numbered 186) without forming part of it. The northern half is also clearly shown outside any hereditament.
12. The applicant has drawn comparison with the main roads connecting Trunch with Gimingham and Trunch with Southrepps which are shown in similar manner on the same extract.
13. Under the 1910 Act all land was required to be valued unless exempted. Routes shown on the base plans which correspond with known public highways, usually vehicular, are not normally shown as included in the hereditaments. Instead, they will be uncoloured and unnumbered.
14. The Council may possibly be correct in referring to the source of this practice as section 35(1) of the 1910 Act which provided that "No duty under this Part of this Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority...". However, it is by no means certain that is the reason why the practice was adopted of leaving public highways uncoloured and unnumbered.

15. As the route is uncoloured to indicate no valuation was taken, the applicant says it strongly suggests the route is a vehicular highway. The objector takes the reverse view that no discount was applied to the landowner because there was no highway crossing his land.
16. Where, as in this instance, a route is outside a numbered hereditament there may be a strong possibility that it was considered a public highway, normally vehicular, but there could be other reasons for its exclusion. It is one strand of evidence for consideration in the round with all other relevant material.

Ordnance Survey Maps & Aerial Photography

17. The Order route is shown by solid parallel lines on the OS Old Series map of c1838. It is similarly shown on the OS County Series 1st edition map of 1885 along with the 1st edition 1886 and 2nd edition 1905. All depict the route in the same way as roads to the north and south which are public highways, including with colour wash on the 1885 edition. The route is annotated as 'Postle's Lane' on the three later maps.
18. The lane is also clearly visible in aerial photography images of 1946 and 1988.
19. These documents confirm the physical presence of the lane throughout those years, but do not clarify its status.
20. Clarification is found in the OS 'Object Name Book'. These were compiled in some areas to accompany the first edition OS map generally from the mid-nineteenth century onwards. It records information about the names given to features on OS maps, including those given to roads.
21. The relevant Object Name Book for Norfolk dated 31 July 1906 lists 'Postle's Lane' and the entry that appears alongside reads "Applies to a public road commencing about 15 chains w.s.w. of Trunch Brewery and running in a N. direction for a little more than a ¼ of a mile." Thus, the Order route is explicitly identified as a public road.

Ministry of Food National Farm Survey Maps

22. An extract of the Ministry of Food Farm Survey (1941-42) Map held at the National Archive is produced by the applicant which is based on OS sheets. This shows the extent of each farm and other agricultural holdings, with its boundaries. The area of each farm is indicated on the map by the use of a colour wash with its code number added in black ink. Postle's Lane is shown uncoloured as separate from the ownership of farm land on either side. This infers that it was regarded as a highway rather than a private farm road.

Archival records

23. Only the start of the Order route at its northern end is shown on Faden's Map of Norfolk (1797). The map was available for public purchase and identifies certain physical features including "great roads" and "cross roads" as listed in the key. It is possible the route did not correspond with the type of road being depicted as suggested by the applicant. On the other hand, the objector believes that as the route is shown to terminate into a field it is clearly a "track entrance" and does not constitute a public thoroughfare through to Brewery Road. That is a plausible explanation also.

24. Although the objector contends that the route is not shown even as a farm track on Bryant's Map of Norfolk 1826, there is a route shown by unbroken parallel lines which corresponds with the position of the Order route. The applicant identifies this as being a 'Good Cross or Driving Roads' on the key. The line is slightly thicker on one side which could indicate a 'Turnpike & Mail Roads'. Either way, the entirety of the route appears to be shown as a road.
25. The objector suggests that on many of the maps, including Bryant's, other farm tracks are illustrated as field entrances and a means of accessing small parcels of land and could not be interpreted as highway coming to a 'dead end'. Bryant's map does indeed show the start of some routes, but that does not include the Order route which connects with other routes at both ends.
26. The physical presence of the route is identified in the Cassini Map of 1838, but as a reprint of the OS one inch series it adds little to the documentary evidence.
27. In the County archive there is a letter dated 4 June 1986 from the landowner at the time to the County Council's Highways Department. It lodges notice under section 31(6) of the Highways Act 1980 to say that, aside from one public footpath, at no time since their ownership in 1931 have rights to walk or ride horses been granted over the 'tracks' on the farm, including Postle's Lane.
28. The effect of a notice deposited with the Council under section 31(6) where supported by a statutory declaration lodged within 10 years is to rebut the intention of the owner or his successors in title to dedicate any additional highway during the associated relevant period.
29. However, the notice could not have effect if the Order route was already subject to the claimed public rights prior to it being deposited in June 1986. The claim in this instance is that this is an historical route and so the deposit under section 31(6) is inconsequential if found to exist prior to that date.

Bartholomew's map

30. Additional documentary evidence was produced by the applicant when the Order was submitted to the Secretary of State for confirmation. In particular, an extract is provided from Bartholomew's half inch map of 1903.
31. The route is shown on Bartholomew's map as an uncoloured road. The explanatory note endorsed on the map says "The uncoloured roads are inferior and not to be recommended to cyclists". It contains a disclaimer that "The representation of a road or footpath is no evidence of the existence of a right of way."
32. The applicant makes the point that the map was made for sale to the public, particularly tourists and cyclists and so is unlikely to show routes that the public could not use. However, whilst Bartholomew were highly regarded map producers, current evidence indicates they did not employ independent surveyors to carry out any surveys on the ground nor to determine the nature and status of the roads on their maps.
33. The applicant maintains that at least some weight must nevertheless be given to this source and draws my attention to the judgment in *Commission for New Towns and Another v J J Gallagher Ltd*¹ where the Court, at paragraph 108,

¹ [2003] 2 P & CR

considered Bartholomew's Map of England. In reference to the 1901 and 1911 editions it was noted by the Court that there were three categories of coloured roads being "first class roads", "secondary roads (good)" and "indifferent roads (passable)" with two other categories, namely uncoloured roads and "footpaths & bridleways".

34. Those classifications correspond with the details given on the 1903 map produced in this instance. In the *Gallagher* case, the road in question was an uncoloured inferior road, as per the Order route now under consideration. The Judge stated that the implication of the demarcation appeared to be that they are public carriageways. The reason given was that firstly, each of the other four categories is a public highway. Secondly, the indication in the description of the uncoloured road is that they can lawfully be used by cyclists, which as at 1901 and 1911, would have meant that they were public carriageways.
35. However, the Judge considered it important to note the disclaimer. Whilst the Judge did not consider that its effect was to cast aside what could otherwise be gleaned from the map, *"the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps..."*
36. Accordingly, it is clear from the judgment that not much weight can be placed on the 1903 Bartholomew map.

The Natural Environment and Rural Communities Act 2006

37. As this Decision is concerned with a possible unrecorded vehicular route, it is necessary to have regard to the provisions of section 67 of the 2006 Act which extinguished public rights of way for mechanically propelled vehicles, subject to certain exceptions. None of those exceptions apply here. Therefore, if any rights for mechanically propelled vehicles had been established along the Order route then they would have been extinguished as a result of the 2006 Act.

Conclusions on the evidence

38. The weight attaching to the evidence as a whole must be assessed. Historical evidence does not need to be supported by public user evidence in order to demonstrate higher public rights.
39. The applicant acknowledges that no single piece of evidence is conclusive, but points to the documentary evidence collectively.
40. Whilst accepting that Postle's Lane is visible on some of the maps, the objector contends that many of the maps have been misinterpreted. Rather than highway, he asserts that they show nothing more than farm tracks used by farmers and estate workers for daily farming duties on horseback with carts and to access stock. The objector maintains that there is no evidence to support the view they were used by the public and the main highways link communities whereas the tracks do not.
41. Although the presence of the route could be depicted on some maps as nothing more than a farm track, such as Faden's map and possibly the OS maps, it is inconsistent with other documentation.
42. Trunch Tithe Map and Apportionment indicate that the Order route is a public road. This is supported by the OS 'Object Name Book' of 1906 which positively identifies Postle's Lane as a 'public road'. Bryant's map further lends support to

this being a road with public rights and the Ministry of Food Farm Survey map infers that it is a highway.

43. The exclusion of the Order route from adjacent hereditaments on the Finance Act map gives rise to a strong possibility of the existence of public carriageway rights in the circumstances where its status as a public road is supported in other historical plans.
44. I place little weight on Bartholomew's map in view of the disclaimer. However, there is a series of documents from different sources that are consistent and when taken together they provide persuasive evidence of a road carrying public rights.
45. On the balance of probabilities I am satisfied that the evidence points towards the Order route having been a full vehicular highway dating back to the 1830's at least. This route is not exempt from the statutory extinguishment of rights for mechanically propelled vehicles introduced by subsection 67(1) of the 2006 Act. It follows that the route should be recorded on the Definitive Map and Statement as a restricted byway.

Other Matters

46. I recognise that the landowner is aggrieved about the route being added to the definitive map in the first place and feels the evidence against its designation as a public footpath was ignored. That is a matter beyond the scope of this Decision which must focus on weighing up the evidence both for and against confirmation of the Order as a restricted byway. The Council's legal team may not have been satisfied at the time that the documentary evidence alone sufficed to substantiate public rights, but further historical records have emerged to support the current application. The judgment in *Mayhew v SSE*² confirmed that the evidence may already have been in the Council's possession, but becoming aware of it or a new evaluation of the significance of it can amount to the discovery of new evidence.
47. I understand why the landowner would be unhappy with the Order now made especially as he believes that the route has always been a farm track. It may have the physical appearance of a farm track now, but changes on the ground can occur over the passage of time. This application was made on the basis of historical documentation and I have needed to evaluate that evidence in accordance with the statutory provisions.

Overall Conclusion

48. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed.

Formal Decision

49. I confirm the Order.

KR Saward

INSPECTOR

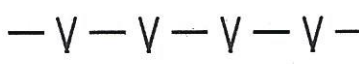
² [1992] 65 P & CR 344

Norfolk County Council
 (Trunch Restricted Byway No. 9)
 Modification Order 2017

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Route to be upgraded to
 Restricted Byway (A-B)



Scale 1:2,500

