

|  |
| --- |
| **Order Decision** |
| Site visit made on 24 May 2022 |
| **by Martin Small BA (Hons) BPl DipCM MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 7 July 2022** |

|  |
| --- |
| **Order Ref: ROW/3245926** |
| * 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 (Parish of Dalham) and (Thingoe Rural District Definitive Map and Statement) (Parish of Denham) Modification Order 2019.
 |
| * The Order is dated 11 November 2019 and proposes to modify the Definitive Map for the parish of Dalham by adding a footpath from Point A to Point B and the Definitive Map for the former Rural District of Thingoe in the parish of Denham by adding a footpath from Point B to Point F as shown on the Order Map and to modify the Definitive Statement as described in the Order Schedule.
 |
| * There were 2 objections outstanding and 2 representations of support when Suffolk 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 subject to the modifications set out in the Formal Decision.** |
|  |

Procedural Matters

1. In his evidence, the applicant erroneously indicated the date of the publication of Cary’s ‘Improved Map of England and Wales’ to be 1802 rather than 1832 (with the relevant map sheet 33 being dated 1828). The applicant’s final comments therefore contained a correction and revisions to the case put forward. The objectors to the Order were afforded the opportunity to comment on the revised case and I am satisfied therefore that they have not been prejudiced by my accepting it.
2. Since the Order was submitted to the Secretary of State one of the objectors has confirmed the withdrawal of their objection conditional on amendment of the Order to describe the position of the claimed footpath more accurately. Suffolk County Council, the Order Making Authority (OMA), supports the addition of a footpath between points A and B on the Order Map and is neutral regarding the addition of a footpath between points B and F.
3. I have observed the line of the claimed footpath from Points A and F on the Order Map. However, as the evidence for the Order route is documentary rather than the position on the ground, I did not walk the entire route. I am satisfied that I am able to make my decision without having done so.

**Background**

1. The case concerns the addition of a footpath which commences at a junction with Dalham Footpath 8 (Point A on the Order Map) and runs in a north-north-easterly direction for 163 metres to the boundary with Denham parish (Point B). From there the Order route runs in a north-easterly direction for 153 metres to Point C before turning generally north-westwards for 22 metres to Point D. The route then turns north-eastward for 43 metres to join the driveway to The Priory at Point E and continues along the driveway for 109 metres, terminating at a junction with the C660 Denham Road (Point F).
2. The Order route was not claimed on the parish survey maps for either Dalham or Denham. There is no mention of the route in the Parish survey documents for Dalham and whilst the survey documents are missing for Denham, there is no evidence that the Order route in Denham was put forward but rejected for inclusion on the Definitive Map and Statement (the ‘DMS’). Neither Mildenhall Rural District Council nor Thingoe Rural District Council, for Dalham and Denham respectively, claimed the route through the process of advertising the stages of the DMS. Consequently, the route was not recorded on the first DMS for either rural district.
3. A previous application made by the applicant in respect of the addition of a public footpath on the Order route to the DMS for Suffolk was refused by the OMA in 2003. A subsequent appeal, Ref E1/V3500/05/02/113, was dismissed by another Inspector on the grounds that the submitted evidence, taken as a whole, did not show that it was reasonable to allege that public footpath rights subsisted on the Order route.
4. In reaching this conclusion, the Inspector had regard to the judgement in *R v SSE ex parte Andrews* (QBD) [1993] COD 477, [1993] (*Andrews No 1*) and found that the purported setting out of a 4 foot wide public footpath in the 1818 Dalham Inclosure Award made under the provision of the 1801 General Inclosure Act was *ultra vires*. However, the judgement in *Andrews No 1* was superseded by the Court of Appeal in the case of *R (oao John Andrews) v SSEFRA* [2015] EWCA Civ 669, [2014] (*Andrews No 2)*, which ruled that the Inclosure Commissioners were empowered to record public footpaths as well as public roads.
5. Subsection 53(2)(b) of the 1981 Act sets out that the surveying authority shall ‘*as soon as reasonably practicable after the occurrence, on or after that date, of any of those events* [specified in subsection (3)]*, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event*’. One of the ‘events’ specified in subsection 53(3)(c) is the discovery of evidence. In respect of the section of the path Points A-B, within Dalham parish, *Andrews No 2* judgement is effectively the ‘discovery of evidence’ that has not yet been considered in its true context. This view is consistent with that expressed in the legal advice sought by both the applicant and one of the parties objecting to the Order.
6. No Inclosure Award for Denham parish has been adduced. The legal advice provided to the applicant and objectors differ on whether *Andrews No 2* represents the discovery of evidence in respect of that section of the Order route within Denham parish. However, it seems reasonable to me that the judgement would have affected the mental process of the Inspector in considering the evidence pertaining to the Denham section and therefore constitutes an ‘event’ for the reconsideration of the Denham section of the Order route. In any event, the applicant has adduced Cary’s map, which was not previously considered by the OMA or Inspector and therefore represents the discovery of evidence.
7. These matters justify the reconsideration of the whole of the claimed route. I am therefore satisfied that the Order was lawfully made by the OMA. Furthermore, these matters also distinguish the case before me from that considered by the previous Inspector.

The Main Issue

1. The criteria for the confirmation of the Order are set out in subsection 53(3)(c)(i) of the 1981 Act. This requires me to consider whether the evidence discovered shows that a footpath should be recorded on the DMS between points A and F. For this to be the case, the evidence must show that the Order route not currently recorded in the DMS subsists and should be recorded with footpath status.
2. As regards documentary evidence, section 32 of the Highways Act 1980 (’the 1980 Act’) requires that I take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway. Therefore, I must consider whether or not the documentary evidence available to me, when considered as a whole, shows that footpath rights have existed historically over the Order route.
3. My decision is reached on the balance of probability. For the avoidance of doubt, whilst having regard to the previous Inspector’s decision, I have determined this case on the evidence before me.

Reasons

*County Maps*

1. Hodskinson’s map of 1783 does not show the Order route but does outline Tunstall Green (subsequently known as Dunstall Green) with distinctive curved boundaries to the east and west. Greenwood’s map of 1825 shows a route depicted as a crossroad on the approximate alignment of the claimed route, although the small scale of the map precludes reliance on an exact alignment. The previous Inspector, on the evidence before him, accepted the OMA’s then view that this depiction was ‘strange’ as the road was not shown on other roughly contemporary small-scale maps and thus gave it neutral weight.
2. The previous Inspector did not have Cary’s 1828/1832 map before him. This map shows a route along the eastern side of Tunstall Green on the approximate alignment of the Order route but on a straighter line than shown on Hodskinson’s earlier map. Moreover, Cary fails to show the new alignment of the road to the west of the Green as provided for by the Dalham Inclosure Award. It is inevitable that old small scale maps contain some inaccuracies so whilst Cary’s map is indicative of the existence of a route, neither the exact position nor the alignment can be relied upon.
3. Greenwood’s and Cary’s maps are of some corroborative evidential weight in support of the existence of a route and are the only evidence before me of the existence of a route between 1818 and the Ordnance Survey map of 1884 (see below). However, given their scale and inaccuracies, I give them little weight in my decision.

*Inclosure Award*

1. The facts set out in an inclosure award carry significant evidential weight due to their being legal documents giving effect to the creation or extinguishment of public highways. The 1818 Dalham Inclosure Map depicts the Order route for Points A-B by a pecked line on the western side of a solid field boundary line, annotated “Public Footway No. 08 Four Feet”. The Inclosure Award sets out the alignment of the route “till it enters a public footpath in the parish of Denham”. Having regard to the judgement in *Andrews No 2* and the absence of evidence to the contrary, the Inclosure Award is very strong evidence of the existence of a public footpath in Dalham in 1818.
2. I have no contemporary map for Denham parish before me to provide the same evidence for a public footpath continuing into that parish. However, the Dalham Inclosure Award indicates that such a route existed. Moreover, it is common sense that a public right of way will terminate at a public place or on another public path or road. It is thus unlikely that the public footpath in Dalham would have simply terminated at the parish boundary forming a cul-de-sac. Even so, the Inclosure Award does not provide the alignment of a path in Denham with only a brief indication of the continuation of the route. I am satisfied therefore that a public footpath in Denham from Point B probably existed in 1818 but on an unknown alignment at that time.

*Ordnance Survey (‘OS’) records*

1. OS maps are not evidence of the status of a way as since 1888 the maps have carried a disclaimer that the representation of a track or way on the map is not evidence of the existence of a public right of way. Nevertheless, they are of evidential weight in determining alignments.
2. There appears to be no indication of a road or track on the alignment of the Order route on the OS 1” map – Old series c. 1835. However, the section Points A-B-C of the route is shown on OS maps from 1884 and on subsequent maps until 1946 by single or double pecked lines annotated ‘FP’. The section A-B is on the alignment set out in the Dalham Inclosure Award. The Order route for Points C-D-E-F is not depicted until the 1946 map, on which the entire Order route is shown as a pecked line. The Order route C-D-E runs within what is shown on maps published in the intervening years as the courtyard of the property now known as The Priory, with Points E-F between double solid lines indicating the access to the property.
3. I accept that it does not necessarily follow that the alignment of the path shown on the OS maps is the same as that of the path that probably existed in 1818 and that only the 1946 map showed the connection of the order route with the C660 Denham Road (Point F). In these respects I concur with the previous Inspector. However, I find it more likely than not that the path would have taken a reasonably direct route to the road and ran along the driveway to The Priory, which was shown on OS maps from 1884 onwards.
4. Moreover, the depiction of the route on these maps in combination indicates sufficient use of sections of the Order route to have created a path on the ground in Denham parish found by OS surveyors over a period of 60 years or more. No other credible alignment for the route from Point B to Point F has been put to me. I am thus satisfied that the OS maps indicate the probable alignment of the public footpath in both Dalham and Denham parishes.
5. It is accepted that positional discrepancies can occur between the precise location of features on the ground and their depiction on a two dimensional map. However, this is true for all features in a given area so any such inaccuracy will have little impact on the relative position of one feature to another. I am therefore satisfied that the alignment of the route shown on the OS maps is reasonably accurate in relation to physical features on the ground and thus are a reasonable basis for the route shown on the Order Map.

*The Finance Act 1910*

1. Documents and plans produced under the Finance Act 1910 are not conclusive in themselves but can provide good evidence regarding the status of a way. The section of the Order route A-B lies outside the assessed area. The section B-C-D-E-F is within the area of hereditament 75. No deduction was claimed for B-C as a public right of way but this does not necessarily indicate that no such way existed; it could simply be that no claim was made. Section C-D-E-F is left uncoloured in the same manner as public roads within the area, such as the C660 Denham Road. This would indicate that this section was not in private ownership or that no owner was found at that time or admitted to ownership.

*Assessment of the evidence*

1. For the section of Order route A-B, the Inclosure Award conclusively indicates the existence of a public footpath. For the section B-C-D-E-F, the Inclosure Award refers to a public footpath in the parish of Denham and it is probable that the route continued beyond Point B given the unlikelihood of the footpath terminating at the parish boundary. The Greenwood and Cary maps indicate the existence of a way on the approximate line of the Order route, although I give them little weight for the reasons given above. Public footpath status for the section C-D-E-F would be consistent with the Finance Map.
2. These conclusions are consistent with those of the previous Inspector, who accepted that it was likely that there was a pre-1818 public footpath in Dalham and, immediately post-1818, a public right of way on foot in Denham. Whilst the Inspector found their alignment was uncertain and no evidence had been produced to show their position on the ground, the Dalham Inclosure map confirms the alignment of the footpath in that parish. I find, on the evidence before me, that the OS maps provide confirmation of the alignment of the route between Points B and F.
3. Taking this evidence together I find it probable that public footpath rights subsist on the Order route.

**Other Matters**

1. The occupiers of The Priory, one of the objectors to the Order, raise concerns about their safety, security and land management. However, they accept that these are not considerations I can take into account in my decision.

Conclusion

1. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed with the modifications set out in my formal decision below.

**Formal Decision**

1. The Order is confirmed, subject to the following modifications:
* In the Schedule for Dalham Footpath 18, the word ‘*crossing*’ in line 2 shall be deleted and replaced with the word ‘*bridging*’; the wording ‘*on the western side of the field boundary, crossing a ditch*’ in lines 3 and 4 shall be deleted and replaced with ‘*(in part next to hedges on the western side of a ditch)*’; the wording ‘*and the start of Denham footpath 10*’ in lines 4 and 5 shall be deleted; and the wording ‘*bridging a ditch and connecting with Denham footpath 10*’ shall be added after ‘*(point B)*’ in line 5.

Martin Small

INSPECTOR

