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| **Interim Order Decision** |
| Site visit made on 1 November 2022 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 January 2023** |

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| **Order Ref: ROW/3278506** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Norfolk County Council (Whitton and Honing) Modification Order 2020.
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| * The Order is dated 21 February 2020 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway between Kitling’s Beck Road and the northern end of Honing Footpath No. 7, as shown on the Order Map and described in the Order Schedule.
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| * There was one objection outstanding when Norfolk County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation
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| **Summary of Decision: The Order is proposed for confirmation subject to modifications as set out below in the Formal Decision.** |
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Procedural Matters

1. I made an accompanied site inspection on 1 November 2022 when I was able to walk the whole of the Order route.
2. Norfolk County Council (NCC), having made the Order on the basis that the Order route is reasonably alleged to subsist, has taken a neutral stance in this procedure.
3. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

The Main Issues

1. The Order was made by NCC under the 1981 Act on the basis of an event specified in sub-section 53(3)(c)(i). It proposes to add to the definitive map and statement a restricted byway as shown A - B on the Order map. Point A is on the public highway known as Kitling’s Beck Road; point B is on the boundary between the parishes of Whitton and Honing. The parish boundary is the centre of the Order route for a length of approximately 320 metres north of point B, so that part of the route lies within the parish of Honing, but the majority is within Whitton.
2. The requirement of Section 53(3)(c)(i) of the 1981 Act for an order to be made is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way which is not shown in the definitive map and statement subsists or is reasonably alleged to subsist.
3. NCC concluded that the historical and documentary evidence is sufficient to raise a reasonable allegation that the Order route subsists as a restricted byway. For the Order to be confirmed, I must be satisfied that the evidence shows that the public right of way described in the Order subsists on a balance of probability. A reasonable allegation is not sufficient at the confirmation stage.
4. For the Order route to be confirmed as a restricted byway I will need to be satisfied on the evidence that the route had the status of a byway open to all traffic (BOAT) but that the right to use it with mechanically propelled vehicles was extinguished by operation of the Natural Environment and Rural Communities Act 2006 (NERC) section 67.

Reasons

*County Maps*

1. Faden’s Map of Norfolk (1797) depicts a route consistent with the Order route. The key indicates that the route is shown as a ‘Cross Road’. The route is shown to continue south beyond point B, past the site of an ancient stone cross and on to connect with another route, thus broadly following the course of Footpath 7 Honing (FP7). My attention is drawn to the fact that this map was produced for sale to the public and it is suggested that it would be unlikely to show routes not available for public use. I note however that the map shows as ‘Cross Roads’ other routes which do not currently have any public status. Examples include the track serving the property now known as River Farm and properties beyond and the route shown to bisect the Order route in the vicinity of the old stone cross.
2. Bryant’s Map of Norfolk (1826) depicts the route as a lane or bridleway. Like Faden, Bryant shows a route continuing south past B, but unlike Faden, Bryant’s route is shown as a cul-de-sac. The access to River Farm is depicted, in the same manner as the Order route, but as a cul-de-sac terminating at the farm buildings. Numerous other cul-de-sacs routes are shown.

*Inclosure Award and Map*

1. The Inclosure Map for Whitton, Bacton, Edingthorpe and Paston (1827) covers the section of the route lying within the parish of Whitton. The Order route is shown on the map in the same manner as other routes now regarded as public roads but is neither set out nor stopped up by the award. The map is therefore evidence of the existence of the route but is of limited value in determining whether it was private or public, and if public, of what status.

*Tithe Records*

1. The Whitton Tithe Map (1841) and Apportionment (1842) and the Honing Tithe Map (1841) and Apportionment (1845) depict and refer to the Order route. In both cases the route is given an apportionment number and is listed in the apportionment under the heading ‘Public Roads’. This is some evidence that the route was considered to be public, but not necessarily of vehicular status. Interestingly the route is given different names in the two apportionments; in Whitton it is referred to as ‘Gedge’s Lane’ whereas in Honing it is referred to as ‘Walsham Mill Lane’. Given that both maps are of the same date this discrepancy is difficult to understand and does not add to the credibility of the evidence.
2. It was the purpose of Tithe maps to identify land subject to tithe, not to distinguish between public and private rights of way. The weight that I can attach to this evidence has to be measured accordingly.

*Ordnance Survey (OS) Maps*

1. The OS Old Series published c.1838 shows the Order route as a track between solid line boundaries. There appears to be a line across the entrance to the road where it joins the highway at point A suggesting the possibility that it was gated or otherwise enclosed. The route is shown to continue south beyond point B but to terminate well before reaching the stone cross. A dotted line, suggestive of a footpath, is shown continuing south on the alignment of FP7 and passing the stone cross.
2. The OS County Series, First Edition, published in 1886 shows the Order route as a track between solid line boundaries with trees in the verge. For part of its length the parish boundary is shown in the centre of the road. A route is shown continuing south of Point B although this is shown without trees, suggesting passage over open fields. The map extract provided does not extend far south beyond point B and it is not possible to identify how the route continues beyond this point. The Applicant comments that the route is depicted ‘in the same manner as other routes today regarded as public roads.’ Whilst this is accurate, it is also misleading in that other routes, which are not today regarded as public roads, are shown in identical manner; an example is the track giving access to what was then shown as Gage’s Farm and is today known as River Farm.
3. OS maps carry a disclaimer that they do not purport to distinguish between public and private routes. The weight that can be attached to the representation of a route on an OS map is therefore confined to evidence of alignment and physical characteristics.
4. The OS Boundary Remark Book for the parish of Honing includes a reference to the Order route, no doubt because for part of its length the parish boundary runs along the centre of it. Reliance is placed upon the notation of a track leaving the Order route as a ‘private road’ as evidence of a distinction between the two routes and I am invited to make the inference that the Order route was considered public. I must have regard to the purpose for which this survey was undertaken, which was to check and record parish boundaries. I can attach only limited weight to any inference that may be warranted from this evidence, particularly in relation to vehicular status.

*Finance Act 1910*

1. The evidence of the Inland Revenue Valuation Map is perplexing. The northern section of the Order route is shown uncoloured and excluded from adjoining hereditaments. The remainder of the route is shown within a hereditament charged to duty, albeit with a deduction for unspecified public rights of way. The point at which the ‘white road’ ends does not appear to bear relation to any known feature other than a field boundary to the west. It is not at the parish boundary nor at any obvious point of access to any other property. It is at odds with every other representation of the track as a single continuous feature.
2. The hereditament within which the southern end of the Order route is shown is of substantial size and it is not possible to identify the routes for which the deduction was made, nor is the nature of the public right for which the deduction was made specified.
3. Ordinarily the representation of a ‘white road’ on a Finance Act map can be good evidence of a public right of way, and possibly a vehicular right. Here however the surveyor has made a deliberate decision to show only part of the Order route as a white road. There must be an explanation for this, but it is not obvious. Given that the track is a single uniform feature the explanation must logically be about something other than the physical characteristics.
4. The Appellant notes examples of routes which are shown coloured in Finance Act maps but which are now considered to have been vehicular highways at the time of the assessment. Whilst I accept that may be the case, it does not help me to understand why the surveyor chose to change the representation of the route part way along it.
5. The inclusion of the southern section of the route in a coloured hereditament is counter-indicative of public vehicular status. In the absence of an explanation for the different treatment of the two sections of the Order route it is difficult to attach significant weight to this evidence when assessing the status of the route as a whole.

*Ministry of Food National Farm Survey (1941-42)*

1. The copy of the map provided to me has reproduced poorly and is difficult to interpret, but I am told the order route is shown uncoloured and excluded from adjoining parcels. It was not the purpose of this survey to investigate the status of the road network and without knowledge of the reason for the representation of the Order route in this fashion the value of the evidence can only be reputational.

*The Definitive Map*

1. No part of the Order route is recorded on the definitive map. Footpath 7 Honing is recorded as a cul-de-sac terminating at point B which corresponds with the boundary with the neighbouring parish of Whitton. From point B the parish boundary continues along the centre of the Order route for approximately 320 metres before turning west.
2. The Applicant seeks to infer that the reason the Order route was not claimed to be added to the definitive map was because it was considered to be an existing public right of way and to have a higher status than that of a footpath. NCC suggest a different possible explanation, that because the parish boundary runs along the centre of the Order route, neither parish may have considered it within their jurisdiction to record it. I cannot be certain why the Order route was not included on the definitive map and there are various possible explanations. I do not consider that any inference of weight can be taken from this.

*Other documentary material*

1. Various newspaper cuttings and guidebooks have been produced demonstrating that the Order route has been promoted as part of a longer walk incorporating FP7. I accept that these documents evidence public pedestrian use of the Order route from the mid-1960’s.

*Conclusions on the historical and documentary evidence*

1. I agree with NCC that the evidence is sufficient to give rise to a reasonable allegation that the Order route is a public vehicular highway. However at this confirmation stage the standard of proof to be applied is the balance of probability.
2. No single piece of evidence is conclusive of public highway status but taken together the documentary historical record provides a strong indication that the Order route is a public right of way and the issue I have to decide is the status of such public right.
3. All of the evidence suggests that the Order route has the physical characteristics of a vehicular way and some of it is consistent with it being a public vehicular highway. I have no doubt that it has been used historically by vehicles to access land and properties. However, of the evidence presented to me, Faden’s is the only map which shows the route as a through road connecting to another vehicular highway. All other maps appear to show the vehicular route as a cul-de-sac, albeit with some variation to the termination point. All show a route of a different nature continuing south along the alignment of FP7.
4. The Order route, if confirmed, will be a vehicular cul-de-sac terminating at point B, although rights on foot would continue along FP7. A vehicle or horse rider arriving at point B could only then turn round and return by the same route they had arrived. The law recognises that a public right of way can exist as a cul-de-sac but usually there would need to be a compelling reason to explain it, such as providing access to a place of public resort, the riverbank or the coast. In the absence of such an explanation, some additional evidence is required to corroborate public status, such as evidence of public expenditure on maintenance.
5. In this case there is no obvious reason for the Order route to exist as a vehicular cul-de-sac. Point B is not a place of public resort and there is no direct corroborative evidence of public vehicular status. The strongest evidence is perhaps that the two tithe apportionments include the Order route under the category of ‘public roads’. Whilst this is put forward as evidence of public vehicular status, the weight that I can attach to it is limited. It was not the purpose of the tithe apportionment to identify public rights of way. It is evidence of the physical characteristics of the route, and that some public right of way existed, but it does not preclude the possibility that the route was an occupation road, used to provide private vehicular access to land and property with some lesser public right.
6. The evidence of the Finance Act map could have provided a degree of corroboration, but the unexplained representation of the Order route in two distinct fashions makes it difficult for me to place significant weight on this.
7. I am also mindful of what is ‘missing’ from the evidence. The assertion is that the Order route was a full public vehicular highway and part of the local road network. If that were the case, I would have expected to see some evidence of the inclusion of the Order route on handover maps and possibly evidence of public expenditure on maintenance, but there is none.
8. To confirm the Order I must be satisfied, on a balance of probability that the route has the status of a BOAT, and if so, I would need to go on to consider whether it satisfies the definition of a byway open to all traffic.
9. The evidence in this case is finely balanced. I am satisfied that the Order route is a public right of way, but for the reasons given, I am not satisfied that vehicular rights exist. It is therefore necessary for me to go on to consider the nature of the public right that does exist.

*Evidence of use*

1. This Order is made under Section 53(2)(b) of the 1981 Act and does not rely upon evidence of use to give rise to a presumption of dedication.
2. Evidence of use is given in three user evidence forms. None of the users have used the route regularly. One refers to use on foot, the other two refer to use on foot and on a bicycle.
3. The promotion of the Order route as part of longer walks described in newspaper articles and guidebooks leads me to conclude that the route is used by the public on foot. It is also reasonable to suppose that any user of FP7 would use the Order route to gain access to the public highway at point A.
4. In or about 2013 the landowners erected signs at each end of the Order route. The signs read ‘PRIVATE ROAD Footpath only’. A reasonable interpretation of these signs is that the landowners acknowledge the existence of a public right of way on foot over the Order route, but no higher right.
5. I am satisfied that the logical reconciliation of all of the evidence is that the Order route has the status of a public footpath. I am not satisfied, on the available evidence and on the balance of probability, that any higher rights exist.

**Conclusions**

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

**Formal Decision**

1. I propose to confirm the Order subject to the following modifications:

Delete all references to ‘Restricted Byway’ in the Order and insert ‘Footpath’.

Include the notation for a footpath on the Order Map rather than the notation for a restricted byway and amend the map accordingly.

1. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description as submitted I 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.

Nigel Farthing

Inspector

