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| **Order Decision** |
| Inquiry opened on 22 February 2022 |
| **by Sue M Arnott fiprow** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 27 March 2023** |

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| **Order Ref: ROW/3227322** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Norfolk County Council (Thompson, Pockthorpe Lane) Modification Order 2018. |
| * The Order is dated 6 April 2018. It proposes to modify the definitive map and statement for the area by recording a byway open to all traffic from Pockthorpe Lane to Sparrow Hill, Thompson, as shown on the Order map and described in the Order schedule. |
| * There were two letters of objection and three representations outstanding when Norfolk County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs. |
| **Summary of Decision: Confirmation of the Order is proposed subject to modifications, as set out in Formal Decision below.** |

Preliminary Matters

1. A public local inquiry into the Order was due to open in Thompson Community Centre on 6 April 2020. However, the introduction of restrictions because of the Covid-19 pandemic meant that a public meeting of this nature could not be held as planned and consequently the proceedings were re-arranged, in fact several times. Although the event was eventually scheduled for 22 February 2022, unforeseen and unavoidable circumstances affecting one of the main parties meant that when I opened the inquiry, I immediately adjourned the proceedings in the interests of fairness.
2. It was not until 15 November 2022 that the inquiry was able to get underway. I am grateful to all parties for their forbearance during these challenging times. Although two and a half years had passed since the matter should have been resolved, I am confident that the passage of time has not affected the quality of the key evidence that is central to the determination of this Order.
3. During the afternoon of 14 November 2022, I walked the majority of the route in question, unaccompanied, albeit in two parts since the middle section was overgrown with brambles and other vegetation making safe passage impossible. Nevertheless, I was able to gain a good impression of the claimed right of way.
4. During the second afternoon of the inquiry, I adjourned briefly so as to be able to visit the south-eastern end of the Order route, on that occasion accompanied by both supporters of and objectors to the Order.
5. On the second day of the inquiry, on the advice of Counsel, NCC altered its position as regards the Order and its confirmation. Having been presented with additional evidence at the inquiry and following cross-examination of its witness, Mr Malyon, NCC accepted that, on a balance of probability, the evidence did not support a vehicular right of way as proposed in the Order. However, it remained committed to the Order insofar as a public right of way on foot is concerned.
6. Two applications for an award of costs were made at the inquiry. These are the subject of separate decisions.
7. The road to the east of the point marked A on the Order map is known (now) as ‘Pockthorpe Lane’ but appears in some historical documents as ‘Pockthorpe Road’. For the sake of consistency here and to avoid confusion, I shall refer to it in this Order Decision as Pockthorpe Lane, this being the tarmac road which extends westwards from a cross-roads in Thompson village to point A, not the Order route.
8. The Order route is not shown on the definitive map but a footpath fitting its description is (or was until recently) recorded on the definitive statement as Thompson Footpath No 1..

**Legal submissions**

1. On behalf of Mr and Mrs Scott, Mr Dunlop made two submissions on legal points.
2. Firstly, he submitted that the Order is flawed, void and must be rejected. It was his contention that it had not been made in accordance with section 53 of the Wildlife and Countryside Act 1981 (the 1981 Act) and its relevant schedules as required by the Local Authorities (Functions and Responsibilities)(England) Regulations 2000. The decision to make the Order was not made by elected members but by the Head of Legal Services.
3. Insofar as the authority claimed to have delegated its duties as permitted under its constitution, Mr Dunlop submitted that its constitution cannot overrule the will of parliament since that is supreme in matters of legislation and cannot be undone or fettered by lower authorities. In his view, where orders are made without statutory or common law authority, such orders are void. In support of his point, he referred to the cases of *Miller v The Prime Minister* [2019] EWHC 2381 (QB) and *Entick v Carrington* [1765] EWHC KB J98.
4. It is clear to me that Schedule 15 to the 1981 Act sets out the procedures relating to the making, date of operation, confirmation, modification, notification and validity of definitive map modification orders. On the issue of validity, paragraph 12 of that Schedule is clear: the validity of an order that has come into operation may be challenged only through the courts but otherwise “*shall not be questioned in any legal proceedings whatsoever*”.
5. In this case no submissions have been made to suggest that the requirements of Schedule 15 have not been adhered to. I have been appointed to determine the merits of this Order under the provisions of paragraph 10(1) of this schedule, not to consider whether any or all of the statutory requirements set out in Schedule 14 of that Act have been complied with, nor whether any earlier actions by the order making authority affect the validity of the Order.
6. As far as the validity of the Order is concerned, the legislation seems clear: it is a matter for the courts to decide. I can therefore find no reason not to proceed to determine the Order on the basis of the available evidence.
7. Secondly, Mr Dunlop contended that the inclusion of the Order route in the definitive statement (as Footpath 1 in Thompson Parish) precludes any claim that subsequent use by the public could have established a right of way.
8. In addition, Mr Dunlop referred to the case of *Barkas v North Yorkshire County* Council [2012] and an unreported case (*Bradley v Secretary of State and Kirklees Council [2019]*), he referred to section 56 of the 1981 Act which deals with the effect of the definitive map and statement. This states:

(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely -

(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right;

(e) where by virtue of the foregoing paragraphs the map is conclusive evidence, as at any date, as to a highway shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at that date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date.

1. Mr Dunlop summarises it thus: “*the Map is conclusive as to what it shows but silent on what it doesn’t. The same applies to the Statement. In this case the Map is silent, but the Statement describes a footpath. The Map can only be the primary document when it shows something. If it doesn’t show something, then the Statement is the primary source document. Thus, despite the Map not showing a footpath the conclusive nature of the statement confirmed its existence*.” Further, the Ordnance Survey (OS) noted the route as a public footpath on its later maps. In Mr Dunlop’s submission, user evidence cannot be relied upon “*where the route in question is already recorded and declared to be a public right of way by Statute*”.
2. I will address below the sequence of evidence in relation to the preparation of the definitive map and statement in the 1950s but the outcome of that process, rightly or wrongly, was that the final (and current) definitive map did not show the Order route. However, the definitive statement recorded Footpath No 1 as follows: “Starts from the Watton – Thetford Road and runs south south-eastwards through the brickyard, then turns east south-eastwards to enter the public highway at Pockthorpe”. [It appears that NCC subsequently removed this entry from the current statement although no modification order was made.]
3. This description clearly fits the Order route, but without the conclusive evidence of the definitive map to confirm the alignment of Footpath 1, that cannot be taken for granted. It is clear to me that the legislation effectively makes the definitive map the primary record for good reason. Section 56(1)(a) provides that the map is conclusive evidence of the highway in question. Section 56(1)(e) does enable the definitive statement to provide conclusive evidence of the particulars of the highway but only where the definitive map provides the conclusive evidence of its existence.
4. I agree that the inclusion of Footpath 1 on the definitive statement is relevant evidence that must be take into account along with all other available evidence. However, I reject Mr Dunlop’s interpretation of section 56 insofar as he suggests that this alone offers conclusive evidence of the existence of a public right of way.
5. Although not specifically referred to by Mr Dunlop, paragraph 4.35 of DEFRA Circular 1/09 (v2) advises that it is the Secretary of State’s view that “*It not possible for a right of way to be dedicated for the purposes of section 31 of the Highways Act 1980 when use of the way is by virtue of it having been shown on the definitive map but subsequently removed*.” This is based on the principle that “*rights that cannot be prevented, cannot be acquired*”.
6. In my view, neither the inclusion of Footpath 1 on the definitive statement without being shown on the definitive map, nor the depiction of the route as a public right of way on OS maps, can have the same effect.
7. The Order route does not appear on the definitive map, there is no conclusive evidence of its existence as a public footpath and therefore in principle there is no bar to the establishment of a public right of way along its alignment, either under the statutory approach provided by section 31 of the Highways Act 1980 (the 1980 Act) or under the common law approach.

**The Main Issues**

1. The Order was made by Norfolk County Council (NCC) under the Wildlife and Countryside Act 1981 on the basis of events specified in sub-section 53(3)(c)(i), proposing to add to the definitive map and statement a byway open to all traffic (BOAT) along the route marked on the Order map as A-B-C-D-E-F-G. If I am to confirm it, I must be satisfied that the evidence shows that the public rights of way described in the Order subsist on a balance of probability.
2. In the case of [*Trevelyan v Secretary of State for Environment, Transport and the R*](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2001/266.html&query=(EWCA)+AND+(Civ)+AND+(266))*egions* [2001] EWCA Civ 266 it was noted that “*if, in the course of an inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he (or she) should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry”.* Thus, if not satisfied that the evidence in this case supports the existence of a vehicular highway, it is open to me to consider whether a public right of way of any other type may have been established.

Reasons

1. It is not in doubt that the metalled vehicular highway recorded by NCC as U33191 and known as Pockthorpe Lane extends westwards from its junction with Watton Road, Mill Road and Marlpit Road and terminates around point A near End Cottage. From the cross-roads, Pockthorpe Lane has been officially signposted as “No Through Road” for many years. It serves many residential properties, has a tarmac surface throughout its length and a relatively recent turning area at the end.
2. The route at issue here continues in the same direction from point A and then turns broadly north/north westwards to the unclassified public road (U33437) at Sparrow Hill, known also as the old Thetford Road. No part of the Order route appears to have been metalled and, as far as is known, no works have been carried out along its length by the highway authority over and above those required to ensure the public could use it on foot. Indeed, aside from private access, there is no evidence of use by the public with vehicles other than an occasional bicycle.
3. Three field gates are listed in the Order as limitations on public use at points B, F and G but stiles, kissing gates and waymarkers have also been installed and maintained at the public expense within living memory at other points along the route. More recently, a field gate has been installed a short distance to the west of point A, erected by Mr and Mrs Scott.
4. These are all facts which are not challenged.
5. It was initially NCC’s position that the Order route is recorded in its Schedule of Roads as a ‘soft road’ and that it is therefore a public carriageway. Crucially it believed also that the route was so recorded on 2 May 2006 and therefore section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) could have no effect on the status of this vehicular highway as a BOAT. (This is discussed in more detail at paragraph 113 below.)
6. It was upon discovering the ‘soft road’ in its old highway records that, on 23 February 2016, NCC rejected an application submitted in October 2014 from Thompson Parish Council which sought to add the route to the definitive map and statement as a public footpath. Instead, NCC made the Order to record the route as a BOAT (although it has since concluded that only pedestrian rights exist).
7. The Parish Council still maintains its view that the route should be recorded as a public footpath and has marshalled further evidence of use from several long-standing members of the local community.
8. The Ramblers’ position is similar to the Parish Council: that even if the evidence is not sufficient to show a vehicular right of way, there is enough evidence to demonstrate the existence of a footpath.
9. Landowner (and objector) Leoware Ltd submits that the route is not and never has been a vehicular highway. Neither does it accept that the evidence supports the establishment of a public footpath but it does not object to the route being recorded with that status.
10. Landowner (and objector) Mrs Scott challenges the existence of any public right of way at all along the Order route.
11. Mrs Mallinson challenges NCC’s assertion that the Order route was included in the highway authority’s list of streets on 2 May 2006 and therefore contends that, if found to be a public carriageway, the appropriate status for this route is as a restricted byway.

***Historical documentary evidence***

1. In reaching a conclusion on whether or not a way has been dedicated as a highway, section 32 of the 1980 Act requires me to take into consideration any map, plan or history of the locality, or other relevant document tendered in evidence, giving it such weight as is appropriate.
2. NCC reached the initial conclusion that the Order route is a public carriageway, not from the earliest historical documents it had researched but from the early twentieth century highway records from Wayland Rural District Council (WRDC).
3. Although I agree the latter are amongst the documents likely to carry the most significant weight in this case, I propose to first consider the other early documentary evidence so as to put the highway records into context.

*Early mapping evidence*

1. The earliest map examined was one by Faden dated 1797. This showed no sign of a road on the alignment of the Order route which fell within what was then known as ‘Thompson Common’, later called ‘Bradmoor Common’.
2. Moving into the early nineteenth century, two records date from 1815: firstly, the Inclosure Award covering Thompson with its accompanying plan, and secondly, a plan showing “titheable and tithe-free lands and former commons”. On both plans the (tarmac) road section of Pockthorpe Lane appears as a cul-de-sac route leading to the common beyond, including A-B but no further. The Inclosure Award sets it out as a private road “*for the use and convenience of the owners and occupiers for the time being of lands adjoining thereto*” but the Order route is not mentioned beyond point B.
3. A further plan (undated but estimated to originate c1815) from the Colman collection appears to show Bradmoor Common pre-inclosure with no indication at all of Pockthorpe Lane. This seems to suggest that the lane did not exist pre-inclosure but came into existence through that process.
4. However Bryant’s map of the county in 1826 clearly showed Pockthorpe Lane as a short cul-de- sac, as did an estate map from the Walsingham (Merton) Collection dated either 1857 or 1870.
5. Bryant also showed a track from Sparrow Hill to the “Brick Kiln”, possibly along the Order route southwards from point G. Over 50 years later, in 1883 the OS published its first edition map (at 6” to the mile and 25”) revealing for the first time a track connecting Pockthorpe Lane with Sparrow Hill, along the length of the Order route. The track is connected to several others in and around the works identified on the map as Brick Field.
6. The same track appears on the much smaller scale one inch to one mile map of 1897 and again on the second edition 25” to one mile map of 1905. However, there is nothing visible on any of these OS maps that implies the way was available to, or used by, the public although neither can that be discounted.
7. It was this second edition 1905 map that was used as a base for the 1910 Finance Act records. Other than the section of Pockthorpe Lane as far west as point B, none of the track is excluded from adjacent hereditaments as might be expected for a recognised vehicular highway; neither was any deduction claimed for a right of way across any of the affected land parcels in 1912. [Worthy of note is that the associated records state that buildings at the brick works were in ruins at that time.]
8. Jumping back in time again, Thompson Parish Council submitted a colourful document entitled “Map from the Annals of the Parish of Merton by Reverend George Crabbe 1851-1884” (a local historian) which states that it is a “rough copy, reduced of a map of part of the Merton Estate about 1839”, post-dating the inclosures of 1815. This makes reference to a map dated 1790 and appears to show a road (coloured red) along Pockthorpe Lane and continuing along the line of the Order route, skirting an area labelled “Brick Yard”. Red is stated to denote “Roads” although there is no differentiation between public highways and private estate roads.
9. The conclusion I reach from an examination of these records is that the historical origin of Pockthorpe Lane most probably dates from the inclosure period, that it began as a private road leading to the common with the Order route becoming defined at some time in the mid-late nineteenth century, most probably as a private estate road connected with the brick works.

*Highway records*

1. The minutes of meetings of the WRDC Highways Committee in 1914 reveal correspondence with the Reverend Rose of Pockthorpe Methodist Chapel who was instrumental in leading a campaign to have the authority take responsibility for repairs to “Pockthorpe Road” with a financial contribution from some of the adjoining landowners. Eventually, on 9 February 1914, WRDC resolved to “*undertake the repair of this road from this date*” and arrangements were put in hand to carry out certain works.
2. I will jump forward to the minutes of the same committee on 16 December 1935 when it seems an approach from Thompson Parish Council questioned whether WRDC had responsibility for “Pockthorpe Road”.
3. In the intervening years, the Local Government Act 1929 had required district councils to pass responsibility for maintaining highways to the county councils as from 1 April 1930.
4. As a result of investigating the Parish Council’s query, on 13 January 1936 the minutes noted that WRDC admitted the road had been accidentally omitted from the schedule and map of highways handed over to NCC. Later, on 6 April 1936, the minutes record that NCC’s Highways Committee had accepted this as a county road that was “*repairable by the inhabitants at large*”.
5. One other piece of evidence from these WRDC minutes deserves consideration: this arises in 1948 and appears to stem from a letter written by Lord Walsingham querying whether what was referred to only as “Roadway, Merton” was maintained by “*the old RDC, previous to the road being handed over to the County Council*”. It was discovered that this roadway was actually in Thompson parish, not Merton, and further that it was included in the schedule which accompanied the map of highways handed over.
6. The minutes state: “*We have also obtained the late RDC Surveyor’s map and this also shows this road as a Highway repairable and it looks as though there is no doubt that this road has been repaired in the past by the Rural District Council*”. Subsequently, on 15 February 1949, the minutes note that NCC had accepted this road as “a highway repairable” and works were put in hand. By 17 April 1951, in response to its complaint about the condition of “Pockthorpe Road”, Thompson Parish Council were to be informed that “*this road will be tar patched as soon as weather conditions permit*”.
7. No maps or plans relating directly to any of these items have been discovered. Consequently it is unclear whether the “Pockthorpe Road” that is referred to extended only to what is now the metalled section east of point A or whether it also included all or part of the Order route. Since the 1914 repairs involved the carting of materials (presumably stone), from the available details it seems unlikely to have extended beyond the cul-de-sac section I am referring to as Pockthorpe Lane.
8. Minutes from Thompson Parish Council from 1912 do not assist greatly other than to record that the maintenance of (initially a footpath along) Pockthorpe Lane had prompted the Council to check the inclosure award to ascertain its status. The minutes note that this was found to be a “*Private Road but a Public Footpath*” - yet an examination of the award for this inquiry revealed no reference to a footpath.
9. The possible candidates for the “Roadway, Merton” in Thompson parish are limited with the Order route being the most probable, but to make sense of these extracts requires examination of the surveyors’ maps and schedules from this period compiled by WRDC and NCC.
10. There are 3 maps and a road schedule to consider.
11. The first is a map, believed to originate from WRDC, showing a number of marked routes. Mr Malyon submitted this must be dated around 1927 on the basis that it is similar to a series of others for different rural districts, one of which was date-stamped on its title page. All are based on Bacon’s Motoring and Cycling Road Map of Norfolk – Half Inch Series.
12. Given the date, the most likely explanation is that these maps were prepared by each district council in readiness for the handover of responsibilities but there is nothing to confirm that. However, the conformity with maps for other districts suggests this was not the map from which Wayland RDC highway engineers had originally worked, but a copy prepared specifically for the handover.
13. Both Pockthorpe Lane and the Order route are drawn on this map in the same notation as what appear to be other roads although there is no key to explain the black lines marked over the Bacon base map.
14. The next map is thought to date from 1929, immediately after the handover, and to have been prepared by NCC as a record of the new highways for which it had acquired responsibility. It also used the same Bacon map as a base but again there is no key. On this map certain roads are cross-hatched, suggesting these may be the transferred roads, yet there are several in the locality which had been on the 1927 map that are missing including the Order route and Pockthorpe Lane.
15. Moving on to the third map, again said to be an NCC ‘handover map’ but dating from the 1950s. On this version other previously missing roads are shown but not the Order route or Pockthorpe Lane.
16. In addition, there is an undated (hand-written) schedule of roads for Wayland Rural District. Two sheets are relevant here: both list unclassified roads but one lists specifically “Soft Roads”. Unclassified road 3191 is listed on both. Curiously, the cul de sac section is listed after another entry which was ‘taken over’ in 1967 (although other evidence points to 3191 becoming maintainable by WRDC in 1914 and formally accepted by NCC in 1936). However, the Order route (listed as soft road 3191) is first on that list.
17. This schedule is clearly one prepared by NCC, not the one from WRDC which accompanied the handover map (see paragraph 51) above. Close examination of these two sheets casts some doubt on their date, estimated by NCC to be 1940s. Whilst these may have been started then, they seem to me to have been part of a working document, with roads being added over time as new roads were adopted or, in the case of Pockthorpe Lane (and perhaps the Order route) when an omission was discovered.
18. I tend to agree with the objectors that both sheets must be pre-1974 but the record for Pockthorpe Lane must post-date 1967 because of the order of entries. There is no obvious explanation for this nor one than can be deduced from the minutes or maps I have examined, particularly since NCC’s 1929 and 1950 maps omitted both sections.
19. At the inquiry Mr Dunlop introduced further evidence in the form of an Order made by NCC in 1957 under the Public Health Act 1925. This identified ‘new streets’ to which byelaws were to be applied under the Act. Both the schedule attached to this Order and the accompanying map (similarly based on Bacon’s map) showed Pockthorpe Lane as a cul de sac. However, it is difficult to understand why the 1950s version of the handover map did not also show Pockthorpe Lane when it seems this would have been the obvious reference point for its 1957 map.
20. For Leoware, Ms Golden submitted that this map emphasised the substantive difference between the Order route and Pockthorpe Lane. Taken together with the road schedule, I would agree. Aside from the formal minutes and 1957 Order, I also take on board her submissions about the provenance of all these documents. The maps do not have titles to confirm their purpose, neither do they have dates or keys to the notation used, and the authority that prepared each one is presumed rather than certain. Further, as internal documents, they would not have been subject to public scrutiny.
21. It is confirmed as a fact that in 1914 Pockthorpe Lane became maintainable at public expense. Although Mr Dunlop argues there is no evidence to indicate the adoption procedures and standards set out in the Highways Act 1835 were adhered to at that time, subsequent reference in these documents all tend to support that outcome for this section. Indeed, I have already noted that this fact is not in dispute here.
22. The question is whether this evidence is sufficiently robust, when judged on a balance of probability, to demonstrate that the same process in 1914 also encapsulated the Order route. It was apparently shown on the “*late RDC Surveyor’s map*” according to the 1948 minutes and this was probably the basis for the 1927 WRDC handover map. There is no way of knowing whether that surveyor’s map accurately reflected the route that was the subject of the Reverend Rose’s campaign or whether this was the point at which a mistake occurred, with the public’s rights recorded beyond Pockthorpe Lane through to Sparrow Hill for the first time. All subsequent records showing the whole route can be traced back to this (pre-1927) map.
23. I also agree with Ms Golden’s submission that acceptance as a highway maintainable at public expense says little about the rights the public may have enjoyed over such a route. The County Surveyor’s records are of maintenance liability, not the status of the highways that are maintained. Although it is generally the case that most highway authorities included only vehicular highways in their list of maintained roads, there is no presumption of such status. The practice of WRDC is not known; it may have recorded its responsibility for maintaining all types of highway or it may not.
24. Even if I was inclined to give this the benefit of the doubt insofar as the Order route might have been taken over by WRDC along with Pockthorpe Lane, I consider Mr Dunlop’s point to be a good one: he argued that the adoption of a soft road would have been contrary to the processes set out in the Highways Act 1835, the Public Health Act 1925 and the Private Street Works Act 1892. All would have required the ‘new’ road to be made up to standard before being taken on by the authority.
25. The minutes refer to contributions from adjacent owners in 1914 and the carting of material to repair the road. Thus, the evidence seems to suggest that occurred in relation to Pockthorpe Lane including subsequent evidence which leads to the present-day tarmac-surfaced carriageway. Yet there is no similar chain in relation to the Order route: there is no obvious evidence on the ground of works to bring it up to carriageway standard, even as a ‘soft road’.
26. Although the pieces of this evidential jigsaw do not fit easily together, on balance I find it insufficient to demonstrate that the Order route was adopted (even informally) by WRDC as a carriageway in 1914. For reasons that cannot now be explained, it was recorded by the authority’s surveyor as a continuation of Pockthorpe Lane but my conclusion is that the evidence, both before and after, is not of sufficient weight to demonstrate a public right of way for vehicles.

*Preparation of the definitive map and statement under 1949 Act*

1. It may have been the process of preparing the first definitive map and statement required by the National Parks and Access to the Countryside Act 1949 that prompted NCC to re-examine its map of maintainable roads, particularly in relation to Thompson.
2. The first stage in this process required by the 1949 Act began with a survey carried out by local people. In this case evidence shows that Thompson Parish Council recorded the Order route as a public footpath.
3. The claimed route (starting from a point east of point A and leading to G) was then included on the draft definitive map as Thompson Footpath No 1. The copy now available shows a hand-written pencil note “*U/C Road*” alongside the path.
4. One might speculate that NCC highways officers discovered that the route had been omitted from the ‘handover maps’ yet, in 1949, had been accepted as being publicly maintainable, thus assuming this to be a vehicular road.
5. Nevertheless, the footpath was carried forward to the next stage, and was included on the provisional definitive map, again as a footpath (not as a ‘Road Used as Public Path’ which might have been expected for a route believed to be a ‘soft road’ carriageway.) However, on the copy of this map, the solid line denoting the footpath has red crosses hand-written over it.
6. At the final stage, the definitive map and statement eventually deposited on 4 November 1964 did not show Footpath 1 at all although there is no related evidence to explain this.
7. Despite its omission from the final definitive map, Footpath 1 remained in the draft, provisional and final versions of the definitive statement, described as “F.P.-Watton-Thetford Road to Pockthorpe ()”.
8. The exact dates for the issue of these editions are not entirely clear. NCC has stated that the draft statement was produced in November 1957, the provisional in March 1961 and the final version in 1966. However, the RA submitted a copy of the press notice for the deposit of the final definitive map and statement on 4 November 1964. Also doubtful is the relevant date of the definitive record which the statement appears to note as 9 November 1957.
9. Whilst I have some sympathy for Mr Malyon facing the task of piecing together apparently disparate records to make sense of the process, the muddle does not inspire confidence in NCC’s past administration.
10. There is no additional material in the form of correspondence from case files or minutes of meetings to shed further light on this process other than in the minutes of meetings of Thompson Parish Council. These record the start of the process in 1949 with local representatives being appointed to survey 5 local paths including “*Brick Yard Footpath*” and in 1953 confirming they had “*done all they could with the footpaths (and) map*”.
11. Subsequent reviews of the definitive map have been mentioned, including one in 1983 under the Wildlife and Countryside Act 1981 but there is nothing to indicate consolidation of later editions. It therefore appears that the definitive map and statement published in 1964 (or 1966) is still the current record.
12. The only firm conclusion I can draw from this process is that in the early 1950s local people believed there to be a public right of way **on foot** from the end of Pockthorpe Lane via the old brick works to Sparrow Hill. The reasons for its removal from the final definitive map are a matter of speculation since there is no evidence to explain it. However, the most likely reason seems to be that it was already categorised as an unclassified road in NCC’s records. As argued by Ms Golden, that may have been simply a perpetuation of the mistake in the county’s road records but it is nonetheless the most plausible explanation.
13. I have already expressed my view that the definitive statement cannot stand alone as conclusive evidence of a public right of way. Nevertheless, the fact that Footpath 1 was included throughout the process of compiling the definitive map and statement with dubious reasons for its eventual omission from the map (if not the statement), deserves some weight.
14. However, Mr Dunlop argued that the Order route disappeared from OS maps after the closure of the brick yard, his point being that the Parish Council had no basis for claiming it as a public footpath in 1949 since it had ceased to exist.
15. Indeed, the 6”:1 mile map published by the OS in 1953 did not show any part of the Order route (other than A-B which formed part of Pockthorpe Lane). This is stated to be a revision of the 1904 edition with additions and major changes up to 1951.
16. Thompson Parish Council reported research which shows that the brickworks were established by 1600 and closed around the time of World War 1. That is endorsed in the statutory declaration submitted by Lord Walsingham and the 1910 Finance Act records noted ruined buildings on the site in 1912. Census records show that the workforce lived in Thompson and would have travelled to work via the track.
17. That evidence does not necessarily indicate a *public* right of way was in use but it does support a tradition of travel from Pockthorpe Lane along the route that appears on earlier OS maps.
18. In contrast to Mr Dunlop’s 1953 OS map, Mr Malyon produced a 1”: 1 mile OS map marked as dating from 1949 which did show the track (although no revision date is given), and Thompson Parish Council submitted a map published in 1962 by the War Office and Air Ministry for Stanford PTA based on OS mapping dated 1950, this clearly showing the Order route.
19. One might deduce that the route ceased to be discernible on the ground as a clear track at some stage in the early part of the twentieth century once the brickworks closed and use by employees ceased. Yet that does not chime with the memories of many older residents of Thompson who have provided statements. I note in particular the written evidence of Mr Kerridge, Mrs Goodwin and Ms Norris whose recollections date back to the 1930s and 1940s, and Mr Rudling who gave evidence to the inquiry of living at End Cottage from 1938 until 1962.
20. Further, Lord Walsingham recalls “*ramblers began walking from Pockthorpe to Sparrow Hill, after the brick kiln closed*”. He states: “*A fence was put up to keep ramblers out of the crops in the 1930s and since then the Estate has maintained a stile which meant walkers aimed for it, so you could say a route for pedestrians has existed since then but not before*.”
21. On balance I consider the evidence does offer positive support for the reputation of the way in 1949 as being a public footpath.

*Post-Definitive Map mapping*

1. It is a fact that the definitive map does not include the Order route although it is described in the definitive statement.
2. Yet, amongst the evidence submitted are a number of OS maps produced after the publication of the definitive map for Norfolk in 1964 (or 1966) on which the Order route is depicted as a public right of way on foot.
3. There is no evidence available to explain this although many theories abound. The source of the information from which the OS chose to show a public footpath is unknown but the representation of a public right of way was not without foundation.
4. Undeniably, the depiction of a public path will have influenced subsequent use by members of the public but, irrespective of its absence from the definitive map, the route had been acknowledged to be a public one by NCC in 1949 when it confirmed it to be maintainable at public expense (as noted in paragraph 52).
5. Mr Malyon submitted two maps produced internally by NCC in the 1960s on which the whole of Pockthorpe Lane and the Order route was shown as an unclassified road. It appears to have been included on NCC’s list of maintainable highways as a ‘soft road’ until 1974 (at least). Yet by 2001, evidence collated by Mrs Mallinson suggests the ‘UCR soft road’ had been removed from the list although no evidence is available to explain that.
6. Indeed, when Mr and Mrs Scott purchased End Cottage in 1998 the official land charges search reported no “public paths or byways” beyond the end of Pockthorpe Lane. It is clear the Order route was not recorded on the definitive map, but the lack of any reference to the previously recorded unclassified road through to Sparrow Hill has not been explained. However, it appears possible that it had, by then, been deleted from NCC’s revised highway maintenance schedule.
7. There is no distinct conclusion I can draw specifically from these later records since the source of the underlying information seems either to stem from the earlier highways records I have already examined or to be largely unexplained.

*Summary and conclusions on the historical evidence*

1. Having examined all the available historical documentary and mapping material, I note firstly that there is strong evidence to show that Pockthorpe Lane became maintainable at the public expense in 1914. Whilst there is limited evidence of the process by which that was achieved, it is clear that the way has been maintained by the appropriate highway authority as a vehicular road to this day.
2. What is not clear is the extent of the highway ‘adopted’ by WRDC in 1914. The handover plan said to date from 1927 indicates that it included the Order route even though the petition in 1914 to have Pockthorpe Lane repaired appeared to focus only on the part serving adjoining properties (that is the previously ‘private’ inclosure road). The NCC road schedules have differentiated between the two parts, the Order route being classified as a ‘soft road’ and subsequent maintenance at the public expense along this section has been limited to that necessary to enable pedestrian use only.
3. It must be remembered that records of maintenance liability are not records of the status of highways. I find there to be no historical basis for a carriageway along the Order route and no direct evidence that a public right of way for vehicles was created over it through the arrangement negotiated in 1914. As reported by Lord Walsingham, the records of the Merton Estate (on which the brickworks stood) have always noted the track as a private one.
4. Looking at all the documentary evidence before me, on balance of probability, I consider that this leans towards the conclusion that the Order route has never been regarded locally as a public carriageway and that use by people on foot continued after the closure of the brickworks. By the 1930s, use by ‘ramblers’ was accepted by the Estate and in the mid twentieth century, usage had developed to the point where the route was regarded as a public footpath and claimed as such by Thompson Parish Council in 1949.
5. Without further evidence to tip the balance otherwise, I am inclined to conclude that NCC’s decision to omit it from the final definitive map was because it was believed to be an unclassified vehicular highway, albeit a ‘soft road’. Looking at the evidence now and with the benefit of hindsight, I regard that as misjudged.
6. There is reliable evidence from local people that the path was in use by the public dating as far back as the 1930s and that use continued uninterrupted until the end of the century. On balance I consider the evidence points towards a long-established public right of way on foot.

*Evidence of recent usage*

1. Whilst the inquiry focussed primarily on the historical evidence, a significant body of information from users of the Order route has been submitted, both from local people who have walked it at some stage in the past and from others who have either organised or joined guided walks which included it.
2. After purchasing their property in 1998 and being informed there was no recorded public right of way over it, Mr and Mrs Scott challenged people at various times over the subsequent years, either personally, via notices or by locking a gate. All of these actions are capable of bringing into question the status of the way for the purposes of section 31 of the 1980 Act, the process by which a public path may be deemed to have been established over the preceding twenty years.
3. However, my conclusion, both from the historical evidence I have examined and from the accounts from people who have known and used the path over many years, is that the Order route had been established as a public right of way on foot long before 1998. There is therefore no need for me to analyse the user evidence in relation to the requirements of section 31, nor to consider Mr Dunlop’s argument that some of the users in relatively recent times had wandered from the original line as vegetation grew unchecked.
4. Indeed, its status as a public footpath is not challenged by one of the three landowners affected [Leoware Ltd] and is admitted by another [in deposits made by Croxton Park Ltd under section 31(6) of the 1980 Act]. I recognise of course that Mr and Mrs Scott were led to believe there was no recorded public right of way when they first bought their property but, through this inquiry process, a great deal of information has come to light that indicates otherwise.
5. As regards usage of the route, there is some evidence of horse riders having sometimes used the way although additional information provided at the inquiry suggested that this may not have been confined only to the line of the Order route. I am not entirely clear how horse riders and the occasional cyclist managed to circumnavigate the stile at point F which Lord Walsingham noted as being installed initially in the 1930s. Without prejudice to any further evidence that may come forward, my conclusion is that this claimed usage is not sufficient to raise any presumption of dedication of the route as a bridleway.
6. There are many references to agricultural vehicles using parts of the route to gain access to farmland but, as far as I can judge from the Land Registry documents provided, these movements are all in the exercise of easements protected under each transfer of ownership.

*Vehicular rights*

1. The Order proposes to record the route as a BOAT. That would require firstly a finding that the way is a public carriageway and secondly consideration of the effects of the Natural Environment and Rural Communities Act 2006. In short, any public rights to use mechanically propelled vehicles (MPVs) on the Order route were extinguished on 2 May 2006 unless such rights were saved (in this case) by the Order route being included on the list of maintainable highways (on that specific date) and not being recorded on the definitive map.
2. Arguments were made by Mr Dunlop, Mrs Mallinson and Ms Golden that the route may well have appeared on **a** list of roads prepared by a previous authority but not **the** list of streets held by NCC under section 36 of the 1980 Act specifically on the relevant date: 2 May 2006. In fact, it was added to that list in 2016 when it was discovered it had been omitted in error.
3. Consequently, the objectors submitted that any public rights for MPVs that existed at that time would have been extinguished, leaving the route a restricted byway.
4. In the light of my conclusion (in paragraph 103 above) that the evidence is not sufficient to show that a vehicular right of way exists, the point no longer arises in relation to the Order route as a whole. However, there is one remaining issue I should address: the status of section A-B.
5. Following the Inclosure Act of 1815, this section formed a part of the cul-de-sac road that was set out as private but later became accepted as the public highway, Pockthorpe Lane. Historically, OS maps suggest that this stretched westwards as far as point B. Yet plans produced by NCC at various times show the highway reaching westwards beyond point A to varying extents. Thus, the same public vehicular rights that reach from the junction in the village to Point A may do likewise.
6. The consequence of that would be determined by whether or not all or part of A-B is included in the road schedule for Pockthorpe Lane. For example, a plan referred to at the Inquiry (at page 457 of NCC’s bundle) showed it extending half way from A to point B. If this is regarded as part of Pockthorpe Lane (and therefore the main highway network), it need not be shown at all on the definitive map. If not, then those carriageway rights will have been reduced by the 2006 Act so that a restricted byway may be recorded on the definitive map.
7. It is not my role to determine land ownership but examination of the Land Registry documents before me leads me to conclude that the route A-B was not included in either title NK219285 (transferred in 1998) or NK233453 (in 1999) although both refer to a right of access over the road coloured brown (which includes A-B). The exclusion of the brown road from adjacent properties would be consistent with this land forming part of the highway, albeit unsurfaced.
8. However, I am not confident that any of the available evidence is sufficiently reliable for me to reach a fully informed conclusion on the westward limit of the carriageway. Insofar as this Order is concerned, I consider it sufficient that I propose to modify the whole of the length from A to G so as to record this as a public footpath. That would be without prejudice to any additional rights that may subsequently be proven to subsist over any part of A-B.

*Overall conclusions*

1. Having examined all the available evidence and considered all the arguments and submissions put forward by all parties in this case, it is my conclusion that the Order route has not been shown to carry a public carriageway when judged on a balance of probability (subject to my findings in relation to section A-B). Therefore, the Order cannot be confirmed as made.
2. However, I consider that same evidence sufficient to show that the route in question probably became established as a public right of way on foot during the first half of the twentieth century. Given the absence of challenge to users of the way until the end of that century, I am satisfied that dedication as a public path can be presumed such as to warrant addition to the definitive record.
3. I therefore intend to modify the Order to effect this conclusion by changing the proposed status from BOAT to footpath, and to alter the width of the way to reflect the passage of pedestrians rather than vehicles other between points A and B where the extent of the road is defined on OS maps.

Conclusion

1. Having regard to the above and all other matters raised at the inquiry and in the written representations, I propose to confirm the Order with the modifications noted my previous paragraph so as to record the Order route as a public footpath rather than as a byway open to all traffic and to modify the recorded width accordingly.

Formal Decision

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

In the Order schedule

In Parts I and II:

* Delete “Byway Open to All Traffic” and substitute “Public Footpath”;
* Amend width of Sections B to C, C to D, D to F and F to G to 2 metres in each case;

In Part II: Delete lines 11-14 and, after “Grid reference TL 9147 9669 to TL 9143 9670 – 5.5 metres” add “as shown bounded by solid lines on the Ordnance Survey map of 1905 Scale 1:2,500”;

On the Order map

* Amend the notation used to depict the Order route to “Public Footpath” using a broken black line;
* Amend width of Sections B to C, C to D, D to F and F to G to 2 metres in each case.

1. Since the confirmed Order would (if modified) show as a highway of one description a way shown in the Order (as made) as a highway of another description, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of my 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.

Sue Arnott

**Inspector**

**APPEARANCES**

**In support**

Mr S Fowles Of Counsel, instructed by Norfolk County Council

*Who called*

Mr L Malyon Senior Legal Orders Officer; Norfolk County Council

**In support of the public non-vehicular rights only**

Mr I Mitchell Ramblers’ Association - Norfolk Area Footpath Co-ordinator

Mr G Winslow Representing Thompson Parish Council

Mr P Rudling

Mr N Cliff

Ms K Keen

Mrs B Tyler

**In objection**

Ms M Golden Of Counsel, instructed by Birketts LLP; Representing the landowner, Leoware Ltd

*Who called*

Mr M Bailey Statutory Objector; Leoware Ltd

Mr A Dunlop Representing statutory objectors Mr & Mrs Scott

Mrs D Mallinson

**DOCUMENTS**

1. Copy of the statutory objections and representations

2. Statement of case submitted by Norfolk County Council and comments on the objections together with 3 bundles of relevant case documents

3. Proof of evidence of Mr L Malyon on behalf of Norfolk County Council with 3 appendices

4. Statement of case on behalf of statutory objectors Mr & Mrs Scott submitted by Mr A Dunlop with 5 appendices

5. Statement of Ann Scott

6. Statement of case on behalf of Leoware Ltd with 5 appendices

7. Proof of evidence of Martin Bailey on behalf of Leoware Ltd

8. Letter to the Planning Inspectorate dated 14 February 2020 from Birketts LLP on behalf of Leoware Ltd

9. Further submissions on behalf of Leoware dated 24 January 2022 with 4 appendices

10. Statement of case on behalf of The Ramblers’ with appendices APP-RAM-1 to 11

11. Proof of evidence of Mr I Mitchell on behalf of The Ramblers’ and updated version received 25 January 2022

12. Statement of case of Thompson Parish Council with appendices 1 - 6.6

13. Email to the Planning Inspectorate sent 19 December 2019 from Mr A Kind on behalf of the Trail Riders’ Fellowship

14. Submission of Mrs D Mallinson dated 17 January 2022 with appendices DM1 – DM4

*Submitted after the inquiry opened on 22 February 2022*

15. Email to the Planning Inspectorate from Mr P Rudling sent on 27/5/22

16. Email to the Planning Inspectorate from Mr N Cliff sent on 28/5/22 with attachments

17. Email to the Planning Inspectorate from Ms K Keen sent on 31/5/22

18. Emails to the Planning Inspectorate from NCC sent 31/3/22 and 11/4/22 referring to editions of the definitive map and statement

*Submitted after the inquiry resumed on 15 November 2022*

19. Letters handed to Inspector from Mr and Mrs Shovelar

20. Supplementary paragraph added to proof of evidence of Mr I Mitchell

21. Copy of OS 1” to one mile map published in 1968 (with key) submitted by Mr I Mitchell

22. Extract from Thompson Annual Parish Meeting Minute Book 16 March 1914 submitted by Mr Winslow

23. Sealed Order dated 1 August 1957 made by NCC under Section 30 Public Health Act 1925 identifying “New Street” with accompanying typed schedule and map

24. Minutes of meetings of Thompson Parish Council 1912

25. Email to the Planning Inspectorate from Mr A Dunlop listing legislation and caselaw referred to

26. Email to the Planning Inspectorate from Ms K Keen sent 15 November 2022 with enclosures

27. Consent Order for case no CO/3060/2019 issued 27/11/2019 and relevant order decision (ROW/3202859) submitted by Mr Dunlop by email on 17 November 2022

28. Three emails to the Planning Inspectorate from NCC sent 17 November 2022 attaching extracts from inclosure award, the key to Bacon’s map, and the front sheets of three rural district council road maps

